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AMERICAN STATE PAPER,

[Concluded.]

Documents accompanying the Message from the President of the United States at the commencement of the Second Session of the Tenth Congress. November 8, 1808.

Extracts and Copies of Letters from Mr. Madison to Mr. Pinkney.

Extracts of a Letter from Mr. Madison, Secretary of State, to Mr. Pinkney, Minister of the United States at London, dated

Department of State, December 23, 1807.

MR. ERSKINE having been so good as to let me know that the mail of this evening will carry his despatches for a *British* packet, which will sail from *New York* immediately on their arrival there, and other conveyances now failing, I avail myself of the opportunity, to inclose you a copy of a message from the president to congress, and their act in pursuance of it, laying an immediate embargo on our vessels and exports. The policy and the causes of the measure are explained in the message itself. But it may be proper to authorize you to assure the *British* government, as has been just expressed to its minister here, that the act is a measure of precaution only, called for by the occasion; that it is to be considered as neither hostile in its character, nor as justifying, or inviting or leading to hostility with any nation whatever, and particularly as oppo-

sing no obstacle whatever to amicable negotiations and satisfactory adjustments with *Great Britain*, on the subjects of difference between the two countries.

The suddenness of the present opportunity does not allow me time to add more than a newspaper, containg a part of the proceedings of congress in relation to the embargo.

P. S. As you may be able to find conveyances to *Paris*, whither none will for some time offer hence, I request the favour of you to communicate to general *Armstrong* the contents of this letter, and through him, or otherwise, to Mr. *Erving* at *Madrid*.

Extract from the same to the same, dated

Department of State, February 19, 1808.

" A vessel having been engaged to carry from the port of *New York* public despatches and mercantile letters to *Europe*, I avail myself of the opportunity of forwarding you a series of gazettes, which contain the proceedings of congress, and such current information as will give you a view of our internal affairs. They will be put, with this letter, into the hands of Mr. *Nourse*, a passenger in the despatch vessel, who will deliver them at *London;* and as the vessel which will have previously touched at *L'Orient*, will, after waiting ten or twelve days at *Falmouth*, return to that port, and thence to the *United States*, you will have an opportunity of sending thither any communications you may wish to make to *Paris*, as well as of transmitting to your government such as may follow up your correspondence, which, at the present period, will be the more acceptable, the more it be frequent and full.

" My last, which was committed to the *British* packet, inclosed a copy of the act of embargo, and explained the policy of the measure. Among the considerations which enforced it, was the probability of such decrees as were issued by the *British* government on the 11th of *November;* the language of the *British* gazettes, with other indications, having left little doubt that such were meditated. The appearance of these decrees has had much effect in reconciling all descriptions

among us to the embargo, and in fixing in the friends of the measure their attachment to its provident guardianship of our maritime interests.

Mr. *Erskine* communicated, a few days ago, the several late decrees of his government, with expressions of the regret felt by his *Britannic* majesty at the necessity imposed on him for such an interference with neutral commerce, and assurances that his majesty would readily follow the example, in case the *Berlin* decree should be rescinded, or would proceed, pari passu, with *France*, in relaxing the rigour of their measures. Mr. *Erskine* was asked, whether his government distinguished between the operation of the *French* decree, municipally on land, and its operation on the high seas. On this point he was unable to answer; as he also was to an inquiry, whether the late *British* decrees had reference to the late extension of the *French* decree with respect to the *United States*. He seemed also, as is perhaps the case with his government, to have taken very little into consideration the violations of neutral commerce, and through them the vast injury to *France* antecedent to the *Berlin* decree. It is probable that something further is to pass between us on this subject."

Extract of a Letter from the same to the same.

Department of State, March 8, 1808.

"Having just learnt that the present mail will arrive at *New York* in time for the *British* packet, I avail myself of the opportunity of forwarding your commission and letters of credence, as successor to Mr. *Munroe*, in the legation at *London*.

Since my last, which went by Mr. *Nourse* in a despatch vessel, bound first to *L'Orient*, and then to *Falmouth*, I have received your communication of the 23d *November* and — of *December*. These, with a representation from general *Armstrong* to the *French* government, on the subject of the decree of *Berlin*, as expounded and enforced in the case of the ship *Horizon*, were thought by the president to throw so much

light on the course likely to be pursued by *Great Britain* and *France*, in relation to the *United States*, that he had the documents confidentially laid before congress.

Mr. *Erskine* has made a written communication on the subject of the *British* orders. I shall answer him as soon as the very urgent business on hand will permit."

Extract of a Letter from the same to the same, dated

Department of State, March 22, 1808.

"My last bears date the 8th instant, and went by the *British* packet. It acknowledged your letter of *November* 23d, and of — *December*. I have since received those referred to in the letter, and also that of *January* 26, which came to hand last evening.

I cannot inclose my answer to Mr. *Erskine's* communication of the *British* orders; the unceasing pressure of other matters, on a state of health still feeble, having thus far delayed it. You will anticipate the complexion which will necessarily be given to it by the character of measures, not only violating our rights, and stabbing our interests; but superadding under the name of indulgences, a blow at our national independence, and a mockery of our understandings."

Mr. Madison to Mr. Pinkney.

Department of State, April 4, 1808.

SIR,

My last was of *March* 22, and went under the care of Mr. *Rose*. I now forward printed copies of the correspondence with him on the subject of his mission, and of the antecedent documents relating to the case of the *Chesapeake*. As soon as the voluminous residue of the communications made to congress issues from the press, it shall also be forwarded. You will find that they include certain documents relating to *France*, which were thought proper for the knowledge of congress at the present crisis.

To these communications I add copies of Mr. *Erskine's* letter to me on the subject of the *British* decrees of *November* last, and of my answer. And that you may have a view of the ground which has been taken with respect to the *French* decree of *November*, 1806, and to the judicial exposition in the case of the *Horizon*, giving to it an illegal operation against the *United States*, I inclose copies of two letters to general *Armstrong* on those subjects.

The president made to congress, a few days ago, other communications relating to the present crisis with *Great Britain* and *France*, among which were Mr. *Erskine's* letter, now inclosed, and a letter from M. *Champagny* to general *Armstrong* explaining the course meditated by the *French* government with respect to the commerce of the *United States*. These being excepted from the confidential character attached to the others have been published, and will be found among the printed inclosures. Your letter of *February* 26th was included in the communications to congress, but not in the exception.

The conduct of the two great contending nations towards this country, as it will now appear to it and to the world, fully displays their mutual efforts to draw the *United States* into a war with their adversary. The efforts on both sides are too little disguised to be worthy the discernment of either, and are addressed moreover to motives which prove great ignorance of the character of the *United States*, and indeed of human nature.

From the posture in which Mr. *Rose's* final reply to the compromise proposed to him placed the question of adjustment in the case of the *Chesapeake*, it remains with the *British* government to resume it, if adjustment be their object. Whether a tender of reparation will be made here, or to you, will also lie on that side. It will certainly be most becoming that government, under all circumstances, to make the reparation here; and this course might of right be insisted on by this government. The president, nevertheless, in the liberal spirit which always governs him, authorizes you to accept the reparation, provided it be tendered spontaneously, be charged

with no condition, unless it be that, on the receipt of the act of reparation here, the proclamation of *July* 2d shall be revoked: and provided the reparation shall add, to the disavowal of the attack on the *Chesapeake*, an express engagement that the seamen retained shall be immediately restored, and that the guilty officer experience an exemplary punishment. The reparation will be the more satisfactory, and not exceed a just expectation, if the restoration of the seamen be made to the very ship from which they were wrested, and if provision be made for the wounded survivors, and for the families of those who lost their lives by the attack.

I must repeat, however, that it is considered entirely proper, that the reparation should be offered here, rather than in *London*, and it is only in the event of a decided repugnance in the *British* government to make it through a functionary here, that you are to accept it there.

The answer to Mr. *Erskine's* letter on the *British* orders, will furnish the grounds to be taken in your communications with his government on that subject. If the cabinet can be brought to view the orders in their true light, a revocation of the whole of them cannot fail to take place, unless they mean to violate every maxim of justice, or are fixed in hostile purposes against the *United States*. In not regarding the orders, indeed, as acts of hostility, and in trusting for redress to the motives and the means, to which they have appealed, the *United States* have given the most signal proof of their love of peace and of their desire to avoid an interruption of it with the *British* nation.

Still it is to be understood, that whilst the insult offered in the attack on the *American* frigate remains unexpiated, you are not to pledge, or commit your government, to consider a recal of the orders as a ground on which a removal of the existing restrictions on the commerce of the *United States* with *Great Britain* may be justly expected.

The two letters to general *Armstrong*, of the 22d *May*, 1807, and *February* 8th, 1808, are poofs of the sincerity and impartiality with which the president has proceeded in relation

to the belligerent parties, and may, perhaps assist you in repressing unjust suspicions, imbibed by the *British* cabinet. It would be happy for all parties, the belligerents as well as the *United States*, if truth could, in this case, be made to prevail; and if the retaliating rivalship of the former against the latter, could be converted into an emulation, as politic, as it would be magnanimous in both, to take the lead in a fair, lawful and conciliatory course, towards a nation which has done no wrong to either. Should the experiment be made on either side, it would probably be followed on the other; and it could never happen, that the side first doing justice would suffer on that account.

In the present state of our relations to *Great Britain*, it would be premature to mark out the course to be pursued with respect to further negotiations on other topics than those above noticed. You are authorized, however, to continue your interpositions in behalf of our impressed or *detained* seamen; and in the event of a repeal of the *British* orders, and of satisfactory pledges for repairing the aggression on the *Chesapeake*, to enter into formal arrangements for abolishing impressments altogether, and mutually discontinuing to receive the seamen of each other, into either military or merchant service, conformably to the instructions on this point transmitted by Mr. *Purviance*.

You will find by a passage in Mr. *Rose's* reply of *March* 17th, that the *British* government does not maintain the principle, that the obligation of the *United States* extends beyond the discharge of deserters from their public service: and by an order of the navy department here, already carried into execution, of which a copy is inclosed, that it has lately been decided that no foreign seamen, whether deserters or not, shall serve on board our ships of war. The principles, respectively manifested by these documents, ought to facilitate such an adjustment as is contended for by the *United States*.

I have the honour to be, &c.

(Signed) JAMES MADISON.

William Pinkney, esq. Minister Plenipotentiary
United States—London.

Extract of a Letter from the same to the same, dated

Department of State, April 30, 1808.

"My last was of the 4th instant, and went by a *British* packet from *New York*. I now forward a copy of it.

"Congress ended their session on the night of the 25th instant. The series of newspapers, herewith sent, affords a view of their proceedings subsequent to the communications last made to you. Some other prints are included which throw light on the workings of public opinion and the state of public affairs.

You will find that the critical posture of our foreign relations has produced provisions of different kinds for our greater security; and particularly that no pains have been spared to stop every leak by which the effect of the embargo laws might be diminished. I refer you also to the report made to the senate by a committee on the documents relating to the affair of the *Chesapeake*, and on the letters of M. *Champagny* and Mr. *Erskine;* and indicating the spirit which may be expected to influence the future policy of this country, if kept under the excitement resulting from the system now pursued against it.

You will observe, at the same time, that, whilst a determination is sufficiently evinced against a dishonourable acquiescence in the despotic edicts enforced on the high seas, the *United States* are ready to resume their export trade as soon as the aggressions on it shall cease; and that in a hope that this might happen during the recess of congress, the president is authorized, in such an event, to suspend, in whole or in part, the several embargo laws.

The conditions on which the authority is to be exercised appeal equally to the justice and policy of the two great belligerent powers, which are now emulating each other in a violation of both. The president counts on your endeavours to give to this appeal all the effect possible with the *British* government. General *Armstrong* will be doing the same with that of *France*. The relation in which a revocation of its unjust decrees by either, will place the *United States* to the

toher is obvious; and ought to be a motive to the measure, proportioned to the desire which has been manifested by each to produce collision between the *United States* and its adversary, and which must be equally felt by each to avoid one with itself.

Should the *French* government revoke so much of its decrees as violate our neutral rights, or give explanations and assurances having the like effect, and entitling it therefore to a removal of the embargo as it applies to *France*, it will be impossible to view a perseverance of *Great Britain* in her retaliating orders, in any other light than that of war, without even the pretext now assumed by her.

In order to entitle the *British* government to a discontinuance of the embargo, as it applies to *Great Britain*, it is evident that all its decrees, as well those of *January* 1807, as of *November* 1807, ought to be rescinded as they apply to the *United States;* and this is the rather to be looked for from the present administration, as it has so strenuously contended that the decrees of both dates were founded on the same principles, and directed to the same object.

Should the *British* government take this course you may authorize an expectation that the president will, within a reasonable time, give effect to the authority vested in him on the subject of the embargo laws.

Should the orders be rescinded in part only, it must be left to his free judgment to decide on the case. In either event, you will lose no time in transmitting the information to this department and to general *Armstrong;* and particularly in the event of such a course being taken by the *British* government, as will render a suspension of the embargo certain or probable, it will be proper for you to make the communication by a courier to general *Armstrong*, to whom a correspondent instruction will be given, and to provide a special conveyance for it hither, unless *British* arrangement shall present an opportunity, equally certain and expeditious."

Extract of a Letter from Mr. Madison to Mr. Pinkney.

Department of State, July 18th, 1808.

"Your communications by lieutenant *Lewis* were safely delivered on the evening of the 8th inst.

As it had been calculated that the interval between the return of Mr. *Rose*, and the departure of lieutenant *Lewis*, would give sufficient time to the *British* government to decide on the course required by the posture in which the affair of the *Chesapeake* was left, its silence to you on that subject could not fail to excite the particular attention of the president: and the appearance is rendered the more unfavourable by the like silence, as we learn from Mr. *Erskine*, of the despatches brought to him by the packet which left *England* and arrived at *New York* at nearly the same time with the *Osage*. I have intimated to Mr. *Erskine* the impressions made by this reserve, without, however, concealing our hope that the delay does not imply a final purpose of withholding reparation, and that the next communications from *London* will be of a different import. They must at least ascertain the real views of the *British* government on this interesting subject."

"There was certainly no just ground for Mr. *Canning* to expect any particular communications from you on the arrival of the *Osage*, unless they should have grown out of such accounts from *France* as would second our demands of justice from *Great Britain*, particularly the revocation of her orders in council: and in imparting to him what you did from that quarter, every proof of candour was given which the occasion admitted.

If Mr. *Canning* was disappointed, because he did not receive fresh complaints against the orders in council, he ought to have recollected that you had sufficiently dwelt on their offensive features, in the first instance; and that as he had chosen to make the formal communication of them to this government through another channel, it was through that channel, rather than through you, that answers to it would be most regularly given."

"The communications and instructions forwarded by Mr. *Purviance*, who was a passenger in the *St. Michael*, will enable you to bring the *British* government to a fair issue on the subject of its orders. If it has nothing more in view than it is willing to avow, it cannot refuse to concur in an arrangement, rescinding, on her part, the orders in council; and on ours, the embargo. If *France* should concur in a like arrangement, the state of things will be restored, which is the alleged object of the orders. If *France* does not concur, the orders will be better enforced by the continuance of the embargo against her, than they are by the *British* fleets and cruisers, and in the meantime, all the benefits of our trade will be thrown into the lap of *Great Britain*. It will be difficult, therefore, to conceive any motive in *Great Britain* to reject the offer which you will have made, other than the hope of inducing, on the part of *France*, a perseverance in her irritating policy towards the *United States*, and, on the part of the latter, hostile resentments against it.

If the *British* government should have elected the more wise and more worthy course, of meeting the overture of the president, in the spirit which dictated it, it is to be hoped, that measures will have been taken in concert with you, and through its minister here, for hastening, as much as possible, the renewal of the intercourse, which the orders and the embargo have suspended; and thereby smoothing the way for other salutary adjustments.

It appears that the *British* government, not satisfied with the general blockade, by her orders of *November* 11th, has superadded a particular blockade, or rather a diplomatic notification of an intended one, of *Copenhagen*, and *the other ports* in the island of *Zealand;* that is to say, a strict and legal blockade of the whole island. The island cannot be much less than two hundred miles in its outline, and is described as abounding in inlets. It is not probable, therefore, if it be possible, that the blockade, within the true definition, should be carried into effect. And as all defective blockades, whether so in the disproportion of force to the object, or in the mode of

notification, will authorize fair claims of indemnification, it is the more necessary that guarded answers should be given, in such cases, as heretofore suggested.

Since the *British* order of ——— evidently inviting our citizens to violate the laws of their country, by patronizing on the high seas their vessels destitute of registers, and other necessary papers, and therefore necessarily smugglers, if not pirates, the circular letter of Mr. *Huskisson* has made its appearance; in which the *United States* are named as alone within the purview of the order. A more extraordinary experiment is perhaps not to be found in the annals of modern transactions. It is levelled, moreover, against a nation towards which friendship is professed, as well as against a law, the justice and validity of which are not contested: and it sets the odious example, in the face of the world, directly in opposition to all the principles which the *British* government has been proclaiming to it. What becomes of the charge against the *United States* for receiving *British* subjects who leave their own country contrary to their allegiance? What would be the charge against them, if they were, by proclamation, to invite *British* subjects, those too expressly and particularly prohibited from leaving their country, to elude the prohibition? or to tempt, by interested inducements, a smuggling violation or evasion of laws, on which *Great Britain* founds so material a part of her national policy? In the midst of so many more important topics of dissatisfaction, this may not be worth a formal representation. But it will not be amiss to let that government understand the light in which the proceeding is regarded by this. I have already touched on it to Mr. *Erskine*, with an intimation that I should not omit it in my observations to you."

"The *French* decree, said to have been issued at *Bayonne*, has not yet reached this country. Such a decree, at such a time, has a serious aspect on the relations of the two countries, and will form a heavy item in our demands of redress. It is much to be regretted, at the same time, that any of our vessels, by neglecting to return home, and conforming to the arbitrary regulations of one belligerent, should expose them-

selves to the arbitrary proceedings of another. So strong and general an indignation seems particularly to prevail here against the *Americans* in *Europe*, who are trading under *British* licenses, and thereby sacrificing, as far as they can, the independence of their country, as well as frustrating the laws which were intended to guard *American* vessels and mariners from the dangers incident to foreign commerce, that their continuance in that career ought to be frowned upon, and their return home promoted in every proper manner. It appears by information from our consul at *Tangier*, that great numbers of our vessels are engaged in a trade between *Great Britain* and *Spanish* ports, under licenses from the former, and that the experiment proves as unsuccessful as it is dishonourable; the greater part of them being either arrested in port, or by *French* and *Spanish* cruisers."

Copies and extracts of Letters from Mr. Pinkney to Mr. Madison with Inclosures.

Mr. Pinkney to Mr. Madison.

London, February, 23, 1808.

SIR,

MR. CANNING has just sent me a note, of which a copy is inclosed, relative to an intended alteration, upon the subject of cotton, in their bill for carrying into execution the late orders in council. You will perceive, that he lays some stress upon the accidental observations, which (as already explained to you in my letter of the 26th of last month) were drawn from me, some time since, upon the singularly offensive project of imposing a transit duty upon our cotton. I mention to you in my letter of the 2d instant, that he appeared to have misapprehended the tendency of these observations, and that, in a subsequent conversation, he showed a disposition to remove this obnoxious feature from their plan, for the purpose of substituting an absolute interdict of the export of that article, under an idea that we should then cease to object to it:

but that I thought it my duty to decline to give him any encouragement to do so, although I agreed, as he seemed to wish it, to mention his disposition to you. A few days ago, he sent for me again, and renewed his proposal, of an immediate change, with respect to cotton, from a prohibitory duty, to a direct prohibition. My answer was the same in substance as it had been before. He then suggested the alternative arrangement, which you will see stated in his note; but, adhering to the determination I had formed, upon the first appearance of the orders in council, to make no compromise (without precise directions from my government) with the system which they announce, by becoming a party to its details, I received this proposal as I had done the other.

The *British* government, however, had resolved to adopt this last mentioned plan, whether it received my concurrence or not, upon a presumption, that it would be more acceptable to us, and perhaps, too, under the idea, that it was more defensible, than their original scheme; and the purpose of Mr. *Canning's* note, is merely to signify to me, in a manner as friendly and respectful as possible to the *United States*, their intention to propose it to parliament. One object of all this is, certainly, to conciliate us, although it may be another, to free their system, as far as they can, from the disadvantage of one of the formidable reproaches which their opponents cast upon it. But the wise and magnanimous course would be, at once to tread back their steps upon the whole of this ill judged measure, instead of relying upon small and unsubstantial modifications, which neither produce an effect upon its character and principle, nor mitigate the severity of its practical consequences. I might, if I thought it advisable, take the occasion, which Mr. *Canning's* note undoubtedly furnishes, to press upon him, once more, the policy, as well as the justice of such a course; but I believe it, under all circumstances, to be more prudent to wait for your instructions, which must, I think, be very soon received.

I have already had the honour to send you two copies of the resolutions, moved in the house of commons, by the chancel-

lor of the exchequer, as tables of export duties, to which their bill should refer. I have inclosed in another letter, with which this will be accompanied, a copy of the bill itself, which will, however, undergo several alterations. These will be found to be explained (as far as I am acquainted with them) in the letter above mentioned.

I have the honour to be, &c.

(Signed) WILLIAM PINKNEY.

Hon. James Madison,
Secretary of State.

Mr. Canning to Mr. Pinkney.

Foreign Office, February 22, 1808.

SIR,

I have already had the honour of assuring you in conversation, of the disposition which is felt by the *British* government, to give due weight to the observations which you have made to me, respecting the unfavourable impression likely (in your opinion) to be excited in the *United States*, by the duty proposed to be levied upon cotton, destined for the use of the enemy, but brought into the ports of this country, conformably to the tenor of the orders of council of the 11th of *November* last.

You are already apprised, that the principle, upon which the whole of this measure has been framed, is that of refusing to the enemy those advantages of commerce which he has forbidden to this country.

The simple method of enforcing this system of retaliation, would have been to follow the example of the enemy, by prohibiting altogether, all commercial intercourse between him and other states.

It was from considerations of indulgence to neutral trade, that the more mitigated measure of permitting intercourse under the restraints and regulations of a duty, in transitu, was adopted; and being adopted with this view, it was not immediately felt by the *British* government, that there might be a

distinction taken by neutral states, with respect to articles the produce of their own soil; and that while the commutation of prohibition into duty was acknowledged as an indulgence, when applied to articles of foreign commerce, of which they were only the carriers, it might be considered as an invidious imposition when applied to their own productions.

The moment that this distinction has been explained to the *British* government, they have been desirous of manifesting every attention to it; and if you, sir, had been possessed of the necessary authority from your government, there would have been no difficulty in entering into a specific agreement with you upon the subject. In order, however, to obviate the objection, in a great degree, I have the honour to inform you, that it is intended to be proposed to parliament, that all cotton, brought into this country, in conformity to the orders of council, should be absolutely prohibited from being exported to the territories of the enemy. But as you are not prepared to take upon yourself to say, that in no case the option would be acceptable, an option will still be left to the neutral owner, either to acquiesce in the total prohibition, or to reexport the article, on the payment of such a duty as parliament may judge it expedient to impose.

I flatter myself, sir, that this alteration in the legislative regulations, by which the orders of council are intended to be carried into execution, will be considered by you as a satisfactory evidence of the disposition of his majesty's government, to consult the feelings as well as the interests of the *United States*, in any manner which may not impair the effect of that measure of commercial restriction, to which the necessity of repelling the injustice of his enemies has obliged his majesty, reluctantly, to have recourse.

I have the honour to be, &c.

(Signed) GEORGE CANNING.

William Pinkney, Esq. &c. &c. &c.

Mr. Pinkney to Mr. Canning.

Great Cumberland Place, February 23, 1808.

Mr. *Pinkney* presents his compliments to his excellency, Mr. *Canning*, and has the honour to acknowledge the receipt of his note of yesterday, relative to an alteration on the subject of cotton, in the legislative regulations, by which the late orders in council are intended to be carried into execution, which Mr. *Pinkney* will hasten to transmit to his government.

Mr. *Pinkney* requests Mr. *Canning* to accept the assurances of his high consideration.

Mr. Pinkney to Mr. Madison.

(EXTRACTS.)

London, May 9, 1808.

I had a conversation with Mr. *Canning* on *Friday* last, in consequence of the arrival of the *Osage*.

As it was obviously expected that I should seek an interview with him, I went to *Downing*-street on the 5th with that object. He had been indisposed, and was not at the office; but in answer to a note which I sent him in the evening, he asked to see me next day at his house in *Bruton*-street.

The *Osage* had for some time been looked for with considerable anxiety, and the government had apparently anticipated a communication (and perhaps a proposal) of some importance, from me, as soon as my despatches should be received. As I had, in fact, no communication to make, it seemed to be proper that I should render the disappointment of as little moment as possible, by the manner of announcing it, without, however, putting any thing to hazard by an indiscreet manifestation of unnecessary solicitude.

The little which I supposed it requisite to say on this occasion appeared to be very well received: and, if any disagreeable impression was left on the mind of Mr. *Canning*, it certainly was not visible. A feeling of regret was perhaps perceptible, and a hope was intimated that the time was not far distant, when I should be enabled to do what, at present, was out of

my power; but nothing occurred which could be construed into a symptom of impatience, jealousy or dissatisfaction. There was, undoubtedly, no real ground for any thing of this sort; but it was, notwithstanding, quite possible that the importance, which it had become a habit to attach to the arrival of the *Osage*, from circumstances principally accidental, might have produced a disposition to think otherwise.

I thought it advisable to make use of this opportunity (although the topic was, in many views, more delicate than it had been) to suggest the propriety of yielding, as the moment was sufficiently favourable to such a course, upon the subject of the late orders in council, of which I had seen nothing to change my original opinion. There was reason to apprehend, however, that it might be worse than useless to press the suggestion, upon my own authority merely, while I could say nothing of the *French* decrees: and, accordingly, I forebore to do so.

An idea has evidently gone forth, since the *Osage* arrived, founded upon rumours of a doubtful description, that our relations with *France* have grown to be extremely precarious, and that we are consequently about to come to an understanding of a very friendly kind with *Great Britain*. It is not improbable that the government has, in some degree at least, adopted this idea.

I have the honour to inclose a copy of a notification, recently received from Mr. *Canning*, of the blockade of *Copenhagen*, and of the other ports in the island of *Zealand*, which I have caused to be communicated in the usual manner, to our consuls and citizens."

"There being no particular inducement for detaining the *Osage*, lieutenant *Lewis*, who will be charged with my letters, will leave town the day after to-morrow; and the ship will sail as soon after he reaches *Falmouth* as possible."

(NOTIFICATION.)

Mr. Canning to Mr. Pinkney.

The undersigned, his majesty's principal secretary of state for foreign affairs, has received his majesty's command to ac-

quaint Mr. *Pinkney*, that his majesty has judged it expedient to establish the most rigorous blockade of the port of *Copenhagen*, and of all the other ports in the island of *Zealand*. Mr. *Pinkney* is therefore requested to apprize the *American* consuls and merchants residing in *England*, that the entrances of all the ports above mentioned are, and must be considered as being in a state of blockade, and that from this time all the measures authorized by the law of nations, and the respective treaties between his majesty and the different neutral powers, will be adopted and executed with respect to all vessels attempting to violate the said blockade after this notice.

The undersigned requests Mr. *Pinkney* to accept the assurances of his high consideration.

(Signed) GEORGE CANNING.

Foreign Office, May 4, 1808.

Extract of a Letter from Mr. Pinkney, to the Secretary of State of the United States, dated

London, June 5, 1808.

"I have the honour to acknowledge the receipt of your letter of the 4th of *April*, by Mr. *Bethune*, together with the printed, and other copies of papers mentioned in it.

I am to have an interview with Mr. *Canning* in a few days (which he will agree to consider extraofficial) in the course of which I intend to press, by every argument in my power, the propriety of their abandoning immediately their orders in council, and of proposing in *America* (the only becoming course, as you very properly suggest) reparation for the outrage on the *Chesapeake*. I shall for obvious reasons do this, informally, as my own act.

Your unanswerable reply to Mr. *Erskine's* letter, of the 23d *February*, has left nothing to be urged against the orders in council upon the score of right; and there may be room to hope that the effect, which that reply can hardly have failed to produce upon ministers, as well by its tone as by its reasoning, will, if followed up, become, under actual circumstances, deci-

sive. The discussion, which Mr. *Rose's* preliminary in the affair of the *Chesapeake*, has undergone, gives encouragement to an expectation, that this government will not now be backward to relinquish it, and to renew their overture of satisfaction in a way more consistent with reason and more likely to produce a just and honourable result.

You may be assured that I will not commit our government by any thing I shall do or say, and that, if I cannot make things better than they are, I will not make them worse.

My view of the course which our honour and our interests have required, and still require, is, as you know, in precise conformity with that of the president; but if it were otherwise, I should make his view, and not my own, the rule of my conduct."

Extracts of a Letter from Mr. Pinkney to Mr. Madison.

London, August 4, 1808.

"The *St. Michael* arrived at *Falmouth* on *Thursday* the 14th of last month, after a passage of eight days from *L'Orient*. Captain *Kenyon* delivered to me on *Wednesday*, the 20th (upon my arrival in town from *Brighton*, where I had been for a short time on account of my health) your letters of the 30th of *April*, and your private letter of the 1st of *May*, together with newspapers, printed copies of the embargo act and its supplements, and of papers laid before congress at their last session. Mr. *Hall* brought me a letter from general *Armstrong* of the 26th of *June*, (of which I send an extract) and Mr. *Upson* brought me a private letter from him with the following postscript of the 1st of *July*. "An order has been received from *Bayonne* to condemn eight other of our ships."

On *Friday* the 22d of *July*, I had an interview with Mr. *Canning*, and renewed my efforts to obtain a revocation of the *British* orders of *January* and *November* 1807, and of the other orders dependent upon them. I have already informed you in my private letter of the 29th of *June*, that on the morning of its date, I had a long conversation with Mr. *Canning*, which

had rendered it somewhat probable that the object mentioned in your letter of the 30th of *April* (of which I had received a duplicate by the packet) would be accomplished, if I should authorize the expectation which that letter suggests; but that some days must elapse before I could speak with any thing like certainty on the subject: and I have mentioned in another private letter (of the 10th of *July*) that it was understood between Mr. *Canning* and myself, that another interview should take place soon after the prorogation of parliament. In effect, however, Mr. *Canning* was not prepared to see me again, until the 22d of *July*, after I had been recalled to *London* by the arrival of the *St. Michael*, and had, in consequence, reminded him of our arrangement by a private note.

In the interview of the 29th of *June*, I soon found it necessary to throw out an intimation, that the power vested in the president by congress, to suspend the embargo act and its supplements, would be exercised as regarded *Great Britain*, if their orders were repealed, as regarded the *United States*. To have urged the revocation, upon the mere ground of strict right, or of general policy, and there to have left the subject, when I was authorized to place it upon grounds infinitely stronger, would have been, as it appeared to me, to stop short of my duty. Your letters to Mr. *Erskine* (which Mr. *Canning* has read and considered) had exhausted the first of these grounds, and endless discussions here, in every variety of form, in and out of parliament, had exhausted the second. There was, besides, no objection of any force, to my availing myself, without delay, of the powerful inducements, which the intimation in question was likely to furnish to *Great Britain*, to abandon her late system; and it seemed to be certain that, by delaying to present these inducements to Mr. *Canning's* consideration, I should not only lose much time, but finally give to my conduct a disingenuous air, which, while it must be foreign to the views and sentiments of the president, could hardly fail to make a very unfavourable impression upon the minds of Mr. *Canning* and his colleagues. I thought, moreover, that if I should reserve the suggestion for a late stage of our

discussions, it would be made to wear the appearance of a concession reluctantly extorted, rather than of what it was, the spontaneous result of the characteristic frankness and honourable policy of our government.

The intimation once made, a complete development of its natural consequences, if properly acted upon, followed of course; and taking advantage of the latitude afforded by the informal nature of a mere conversation, I endeavoured to make that development as strong an appeal as consistently with truth and honour, I could (and there was no necessity to do more) to the justice and the prudence of this government.

It was not possible, however, that Mr. *Canning* could require to be assisted by my explanations. It was plain, upon their own principles, that they could not equitably persevere in their orders in council, upon the foundation of an imputed acquiescence, on our part, in *French* invasions of our neutral rights, when it was become (if it was not always) apparent, that this imputation was completely and in all respects an error; when it was manifest that these orders, by letting loose upon our rights a more destructive and offensive persecution than it was in the power of *France* to maintain, interposed between us and *France*, furnished answers to our remonstrances against her decrees and pretexts for those decrees, and stood in the way of that very resistance which *Great Britain* affected to inculcate, as a duty, at the moment when she was taking the most effectual measures to embarrass and confound it; and when it was also manifest, that a revocation of those orders would, if not attended or followed by a revocation of the decress of *France*, place us at issue with that power, and result in a precise opposition, by the *United States*, to such parts of her anticommercial edicts as it became us to repel.

In a prudential view my explanations seemed still less to be required. Nothing could be more clear than that, if *Great Britain* revoked her orders, and entitled herself to a suspension of the embargo, her object (if it were any thing short of the establishment and practical support of an exclusive dominion over the seas) must, in some mode or other, be accomplish-

ed whether *France* followed her example, or not. In the first case, the avowed purpose of the *British* orders would be fulfilled, and commerce would resume its accustomed prosperity and expansion. In the last, the just resistance of the *United States* (more efficacious than that of the *British* orders) to *French* irregularities and aggressions, would be left to its fair operation (and it was impossible to mistake the consequences), while the commercial intercourse between the *United States* and *Great Britain*, being revived, would open the way for a return to good understanding, and, in the end, for an adjustment of all their differences."

"On the 29th of *July* I met Mr. *Canning* again, and was soon apprized that our discussions, if continued at all, must take a new form."

"As there is now no reason for detaining the *St. Michael*, she will be despatched immediately for *L'Orient*."

[EXTRACT.]

Mr. Pinkney to Mr. Madison.

London, September 6, 1808.

"I have an opportunity of writing by Mr. *Bethune*, who leaves town to-morrow for *Falmouth*, to embark for the *United States* in the *British* packet; and I cannot omit to take advantage of it, although I have still nothing conclusive to communicate.

The *Hope* arrived off *Falmouth*, and landed Mr. *Atwater*, on the 16th of last month, and immediately proceeded on her voyage to *Havre*, with a fair wind. Mr. *Atwater* arrived in *London* on the 20th, in the evening, and delivered your letter of the 18th of *July*.

My public letter of the 4th of *August* will have apprized you of the footing on which my different interviews with Mr. *Canning* left the subject of the *British* orders in council; and my private letter of the 2d of that month, will have made you acquainted with my intention to present, in an official note, what I had ineffectually suggested in conference.

To such a course there could not, even in the first instance, have been any other objection than that it was calculated to lead to discussion, rather than to adjustment; but, whatever might be its tendency, it is certain that I could have no inducement to resort to it, until it was indicated by Mr. *Canning* as indispensable, nor any motive to decline it afterwards.

At our last interview, and not before, it was unexpectedly found, that it was in that mode only, that I could obtain a knowledge of the light in which this government thought fit to view the overture I had been directed to make to it; and I determined, in consequence, to lay before it, in writing, the intentions of the president, with the same frankness which had characterized my verbal communications.

I have now the honour to transmit a copy of the note, which, in conformity with that determination, I delivered in person to Mr. *Canning* on the 26th of last month, a few days after its date. To this note no answer has yet been returned; but it is to be presumed that it will not be much longer withheld.

You will perceive, that some time had elapsed, after I had sent off my despatches by the *St. Michael*, (the 8th of *August*) before my note was presented. The truth is, that I had employed a part of that time in framing a note of great length, which, when nearly completed, I thought it prudent to abandon, in favour of one that held out fewer invitations to unprofitable discussions, which, although I would not shun them, if pressed upon me, I did not suppose it proper that I should seek.

I believed too, that a little delay on my part would be far from being disadvantageous. There would still be sufficient time for obtaining a final answer to my proposal, in season for the meeting of congress; and as the temper of this government, so far as it had been tried, had not appeared to be favourable to my purpose, I believed that I should act in the spirit of my instructions, and consult the honour of my government, by avoiding, under such circumstances, the appearance of urgency and precipitation.

Upon the terms or general plan of my note, it is not, I hope, necessary to remark. You will discover, that it was prepared under a persuasion that, whatever might be its effect, it was infinitely better to make it as conciliatory as, without a sacrifice of principle or national dignity, was possible.

The topics to be embraced by it were such as did not demand, but rather forbade, minute exposition. While it was difficult to urge in their full force without seeming to aim at exciting a disposition unfriendly to the object of my instructions, all the considerations which justified the *United States* in remonstrating against the *British* orders, it was yet more difficult, without a degree of harshness, scarcely suited to the occasion, and without also the hazard of indiscretion, to display in detail the signal injustice and impolicy of persevering in them, after what I had proposed. This could be done, and had been done in conversation; but it did not upon trial appear to be equally practicable, in the more formal and measured proceeding which I was now called upon to adopt.

I considered besides, that an overture so highly advantageous to *Great Britain*, which the *United States* were not bound to make by any obligations of equity, although it was wise to make it, did not require, with any view to the character of my country, or even to the success of the overture itself, to be again recommended by an anxious repetition of arguments already fully understood.

As soon as my note was prepared, I called at the foreign office to arrange an interview with Mr. *Canning*, for the purpose of enabling me to accompany the delivery of it with a communication, which I deemed important, as well as of affording him an opportunity of asking and receiving such explanations as he might desire. The interview took place on the 26th of *August*.

It had occurred to me that it would be proper (and could not be injurious) to read to Mr. *Canning*, from your letter to me of the 18th of *July*, a brief summary of the instructions under which I was acting. This had not been requested; but it could not be unacceptable, and it was, besides, well calculated to do justice to the liberal sentiments by which my instruc-

tions had been dictated, as well as to give weight to my efforts, in the execution of them.

I was led, by the reading of these passages, (without having originally intended it) into a more extensive explanation, than I had before attempted, of the influence which the proposal of my government would have, in truth, as well as in the judgment of the world, upon the supposed justice of their new system, as it affected the *United States*. To that explanation, with the particulars of which I will not, and indeed, for want of time, cannot, at present trouble you, I added a concise recapitulation of some of the prudential considerations which had been so often pressed before, and there I left the subject."

(EXTRACTS.)

Mr. Pinkney to Mr. Madison, dated

London, September 24, 1808.

"I am now enabled to transmit to you a copy of Mr. *Canning's* answer, received only last night, to my note of the 23d of *August*."

"I regret extremely that the views, which I have been instructed to lay before this government, have not been met by it as I had at first been led to expect. The overture cannot fail, however, to place in a strong light the just and liberal sentiments by which our government is animated, and, in other respects, to be useful and honourable to our country."

Mr. Pinkney to Mr. Canning.

Great Cumberland Place, August 23, 1808.

SIR,

I have had the honour, in consequence of the orders of the president, to recal your attention, in the course of several recent interviews, to the *British* orders in council of the 7th of *January* and 11th of *November* 1807, and to the various other orders founded upon or in execution of them: and I now take the liberty to renew, in the mode which I have understood to be indispensable, my instances on that subject.

I need scarcely remind you, sir, that the government of the *United States* has never ceased to consider these orders as violating its rights, and affecting most destructively its interests, upon grounds wholly inadmissible, both in principle and fact.

The letters of Mr. *Madison* to Mr. *Erskine*, of the 20th and 29th of *March* 1807, produced by the official communication of that minister of the order of the 7th of *January*, and the answer of Mr. *Madison* of the 25th of *March* 1808, to a like communication of the orders of the 11th of *November*, contained the most direct remonstrances against the system which these orders introduce and execute, and expressed the confident expectation of the president, that it would not be persisted in.

That expectation has not yet been fulfilled; but it has, notwithstanding, not been relinquished. The president is still persuaded that its accomplishment will result from a careful review, by his majesty's government, made in the spirit of moderation and equity, of the facts and considerations which belong to the occasion.

It is not my purpose to recapitulate, in this note, the statements and reasonings contained in the above mentioned letters of Mr. *Madison*, in support of the claim of the government of the *United States*, that the *British* orders be revoked. I content myself with referring to those letters for proofs which it is not necessary to repeat, and for arguments which I could not hope to improve.

But there are explanations which those letters do not contain, and which it is proper for me now to make. Even these, however, may be very briefly given, since you have already been made acquainted, in our late conversations, with all their bearings and details.

These explanations go to show, that, while every motive of justice conspires to produce a disposition to recal the orders of which my government complains, it is become apparent that even their professed object will be best attained by their revocation.

I have the honour to state to you, sir, that it was the intention of the president, in case *Great Britain* repealed her orders, as regarded the *United States*, to exercise the power vested in him by the act of the last session of congress, entitled "an act to authorize the president of the *United States*, under certain conditions, to suspend the operation of the act laying an embargo on all ships and vessels in the ports and harbours of the *United States*, and the several supplementary acts thereto," by suspending the embargo law and its supplements, as regards *Great Britain*.

I am authorized to give you this assurance in the most formal manner; and I trust that upon impartial inquiry it will be found to leave no inducement to perseverance in the *British* orders, while it creates the most powerful inducements of equity and policy to abandon them.

On the score of justice it does not seem possible to mistake the footing upon which this overture places the subject; and I venture to believe that in any other view there is as little room for doubt.

If, as I propose, your orders should be rescinded as to the *United States*, and our embargo rescinded as to *Great Britain*, the effect of these concurrent acts will be that the commercial intercourse of the two countries will be immediately resumed; while, if *France* should adhere to maxims and conduct derogatory to the neutral rights of the *United States*, the embargo, continuing as to her, will take the place of your orders, and lead, with an efficacy not merely equal to theirs, but probably much greater, to all the consequences that ought to result from them.

On the other hand, if *France* should concur in respecting those rights, and commerce should thus regain its fair immunities, and the law of nations its just dominion, all the alleged purposes of the *British* orders will have been at once fulfilled.

If I forbear to pursue these ideas through all the illustrations of which they are susceptible, it is because the personal conferences to which I have before alluded, as well as the obvious nature of the ideas themselves, render it unnecessary.

I cannot conclude this note without expressing my sincere wish, that what I have now suggested, in conformity with the liberal sentiments and enlightened views of the president, may contribute, not only to remove the more immediate obstacles to the ordinary intercourse of trade between your country and mine, in a manner consistent with the honour of both, but to prepare the way for a satisfactory adjustment of every question important to their future friendship.

I have the honour to be,
With the highest consideration,
Sir, your obedient servant,
(Signed) WILLIAM PINKNEY.

The Right Honourable George Canning, &c. &c.

Mr. Canning to Mr. Pinkney.

Foreign Office, September 23, 1808.

The undersigned, his majesty's principal secretary of state for foreign affairs, had the honour to receive the official letter addressed to him by Mr. *Pinkney*, minister plenipotentiary of the *United States*, respecting the orders in council issued by his majesty on the 7th of *January* and 11th of *November* 1807.

He has laid that letter before the king: and he is commanded to assure Mr. *Pinkney*, that the answer to the proposal which Mr. *Pinkney* was instructed to bring forward, has been deferred only in the hope that the renewed application, which was understood to have been recently made by the government of the *United States* to that of *France*, might in the new state of things which has arisen in *Europe*, have met with such a reception in *France* as would have rendered the compliance of his majesty with that proposal consistent, as much with his majesty's own dignity, and with the interests of his people, as it would have been with his majesty's disposition towards the *United States*.

Unhappily, there is now no longer any reason to believe, that such a hope is likely to be realized; and the undersigned is, therefore, commanded to communicate to Mr. *Pinkney* the

decision, which, under the circumstances as they stand, his majesty feels himself compelled, however unwillingly, to adopt.

The mitigated measure of retaliation, announced by his majesty in the order in council of the 7th of *January*, and the further extension of that measure (an extension in operation, but not in principle) by the orders in council of *November*, were founded (as has been already repeatedly avowed by his majesty) on the "unquestionable right of his majesty to retort upon the enemy the evils of his own injustice;" and upon the consideration, that "if third parties incidentally suffered by these retaliatory measures, they were to seek their redress from the power by whose original aggression that retaliation was occasioned."

His majesty sees nothing in the embargo, laid on by the president of the *United States* of *America*, which varies this original and simple state of the question.

If considered as a measure of impartial hostility against both belligerents, the embargo appears to his majesty to have been manifestly unjust, as, according to every principle of justice, that redress ought to have been first sought from the party originating the wrong. And his majesty cannot consent to buy off that hostility, which America ought not to have extended to him, at the expense of a concession made, not to *America*, but to *France*.

If, as it has more generally been represented by the government of the *United States*, the embargo is only to be considered as an innocent municipal regulation, which affects none but the *United States* themselves, and with which no foreign state has any concern; viewed in this light, his majesty does not conceive that he has the right or the pretension to make any complaint of it, and he has made none. But in this light there appears not only no reciprocity, but no assignable relation, between the repeal, by the *United States*, of a measure of voluntary self-restriction, and the surrender, by his majesty, of his right of retaliation against his enemies.

The government of the *United States* is not now to be informed, that the *Berlin* decree of *November* 21st, 1806, was

the practical commencement of an attempt, not merely to check or impair the prosperity of *Great Britain*, but utterly to annihilate her political existence, through the ruin of her commercial prosperity; that in this attempt, almost all the powers of the *European* continent have been compelled, more or less, to cooperate; and that the *American* embargo, though most assuredly not intended to that end, (for *America* can have no real interest in the subversion of the *British* power, and her rulers are too enlightened to act from any impulse against the real interests of their country) but by some unfortunate concurrence of circumstances, without any hostile intention, the *American* embargo did come in aid of the "blockade of the *European* continent," precisely at the very moment, when, if that blockade could have succeeded at all, this interposition of the *American* government would most effectually have contributed to its success.

To this universal combination, his majesty has opposed a temperate, but a determined retaliation upon the enemy; trusting that a firm resistance would defeat this project; but knowing that the smallest concession would infallibly encourage a perseverance in it.

The struggle has been viewed by other powers, not without an apprehension that it might be fatal to this country. The *British* government has not disguised from itself, that the trial of such an experiment might be arduous and long; though it has never doubted of the final issue. But if that issue, such as the *British* government confidently anticipated, has providentially arrived much sooner than could even have been hoped; if "the blockade of the continent," as it has been triumphantly styled by the enemy, is raised even before it had been well established, and if that system, of which extent and continuity were the vital principles, is broken up into fragments utterly harmless and contemptible; it is nevertheless important in the highest degree, to the reputation of this country, (a reputation which constitutes great part of her power) that this disappointment of the hopes of her enemies should not have been purchased by any concession; that not a doubt should remain to distant

times, of her determination and of her ability to have continued her resistance; and that no step, which could even mistakenly be construed into concession should be taken on her part, while the smallest link of the confederacy remains undissolved, or while it can be a question, whether the plan devised for her destruction, has, or has not, either completely failed, or been unequivocally abandoned.

These considerations compel his majesty to adhere to the principles on which the orders in council of the 7th of *January* and the 11th of *November* are founded, so long as *France* adheres to that system, by which his majesty's retaliatory measures were occasioned and justified.

It is not improbable, indeed, that some alterations may be made in the orders in council, as they are at present framed; alterations calculated not to abate their spirit or impair their principle, but to adapt them more exactly to the different state of things which has fortunately grown up in *Europe*, and to combine all practicable relief to neutrals with a more severe pressure upon the enemy.

But of alterations to be made with this view only, it would be uncandid to take any advantage in the present discussion: however, it might be hoped, that in their practical effect, they might prove beneficial to *America*, provided the operation of the embargo were not to prevent her from reaping that benefit.

It remains for the undersigned to take notice of the last paragraph of Mr. *Pinkney's* letter. There cannot exist, on the part of Mr. *Pinkney*, a stronger wish, than there does on that of the undersigned, and of the *British* government, for the adjustment of all the differences subsisting between the two countries.

His majesty has no other disposition than to cultivate the most friendly intercourse with the *United States*.

The undersigned is persuaded, that Mr. *Pinkney* would be one of the last to imagine, what is often idly asserted, that the depression of any other country is necessary, or serviceable to the prosperity of this. The prosperity of *America* is essentially the prosperity of *Great Britain*, and the strength and power

of *Great Britain* are not for herself only, but for the world. When those adjustments shall take place, to which, though unfortunately not practicable at this moment, nor under the conditions prescribed by Mr. *Pinkney*, the undersigned, nevertheless, confidently looks forward; it will perhaps be no insecure pledge for the countinuance of the good understanding between the two countries, that they will have learnt duly to appreciate each other's friendship; and that it will not hereafter be imputed to *Great Britain*, either on the one hand, that she envies *American* industry as prejudicial to *British* commerce, or, on the other hand, that she is compelled to court an intercourse with *America*, as absolutely necessary to her own existence.

His majesty would not hesitate to contribute, in any manner in his power, to restore to the commerce of the *United States*, its wonted activity; and if it were possible to make any sacrifice for the repeal of the embargo, without appearing to deprecate it as a measure of hostility, he would gladly have facilitated its removal, as a measure of inconvenient restriction upon the *American* people.

The undersigned is commanded, in conclusion, to observe, that nothing is said in Mr. *Pinkney's* letter, of any intention to repeal the proclamation, by which the ships of war of *Great Britain* are interdicted from all those rights of hospitality in the ports of the *United States*, which are freely allowed to the ships of his majesty's enemies.

The continuance of an interdiction which, under such circumstances, amounts so nearly to direct hostility, after the willingness professed, and the attempt made by his majesty, to remove the cause on which that measure had been originally founded, would afford but an inauspicious omen for the commencement of a system of mutual conciliation; and the omission of any notice of that measure in the proposal which Mr. *Pinkney* has been instructed to bring forward, would have been of itself a material defect in the overture of the president.

But the undersigned is commanded no farther to dwell upon this subject than for the purpose of assuring Mr. *Pinkney*, that on this and every other point in discussion between the two governments, his majesty earnestly desires the restoration of a perfect good understanding; and that his majesty would decline no measure for the attainment of that object, which should be compatible with his own honour and just rights, and with the interests of his people.

The undersigned requests Mr. *Pinkney* will accept the assurances of his high consideration.

(Signed) GEORGE CANNING.

Correspondence between Mr. Erskine and Mr. Madison.

Copy of a Letter from the Honourable David M. Erskine, Esq. Envoy Extraordinary and Minister Plenipotentiary of his Britannic Majesty, to the Secretary of State of the United States, dated

Washington, March 12, 1807.

SIR,

I am charged by his majesty to express to the government of the *United States*, his majesty's perfect confidence in their good sense and firmness in resisting the unjust pretensions contained in the decree issued by the *French* government at *Berlin*, on the 21st *November*, which, if suffered to take effect, must prove so destructive to the commerce of all neutral nations.

His majesty has learnt that the measures announced in this decree, have already, in some instances, been carried into execution by the privateers of the enemy, and there could be no doubt that his majesty would have an indisputable right to exercise a just retaliation. Neutral nations cannot, indeed, expect that the king should suffer the commerce of his enemies to be carried on through them, whilst they submit to the prohibition which *France* has decreed against the commerce of his majesty's subjects. But though this right of retaliation would unquestionably accrue to his majesty, yet his majesty is

unwilling, except in the last extremity, to have recourse to measures which must prove so distressing to all nations not engaged in the war against *France*.

His majesty, therefore, with that forbearance and moderation which have at all times distinguished his conduct, has determined, for the present, to confine himself to the exercise of the power given him by his decided naval superiority, in such a manner only as is authorized by the acknowledged principles of the law of nations, and has issued an order for preventing all commerce from port to port of his enemies, comprehending in this order, not only the ports of *France*, but those of such other nations, as, either in alliance with *France*, or subject to her dominion, have by measures of active offence, or by the exclusion of *British* ships, taken a part in the present war.

His majesty feels an entire confidence that the moderation and justice of this conduct will be duly appreciated by the *United States*, and has charged me to express to their government, in the strongest terms, the regret he has experienced in being thus compelled, in his own defence, to act in a manner which must prove in some degree embarrassing to the commerce of neutral nations, and his sincere desire to avoid any stronger measures, to which, however, if the injustice and aggression of his enemies should not be resisted by those nations, whose rights and interests are invaded by so flagrant a violation of all public law, it may be ultimately necessary for the king to have recourse.

I have the honour to be, &c.

(Signed) D. M. ERSKINE.

Hon. James Madison, Esq.
Secretary of State.

Mr. Madison to Mr. Erskine.

Department of State, March 20th, 1807.

Sir,

I have laid before the president your letter of the 12th instant, communicating the views of his *Britannic* majesty, in

relation to the *French* decree of *November* 21st, 1806, and the principle of retaliation, through the commerce of neutrals, who may submit to the operation of that decree; as also, the measure actually taken, of prohibiting all neutral commerce from port to port, of his enemies, not only the ports of *France*, but those of such other nations, as, either in alliance with *France*, or subject to her dominion, have, by measures of active offence, or by the exclusion of *British* ships, taken a part in the present war.

The president cannot be insensible, sir, to the friendship and confidence towards the *United States*, which are signified by his *Britannic* majesty in this communication. In making this acknowledgment, however, the president considers it not less incumbent on him, to reserve, for a state of things which it is hoped may never occur, the right of discussing the legality of any particular measures, to which resort may be had, on a ground of retaliation. At this time, it would suffice to observe, that it remains to be more fully ascertained, in what sense the decree in question will be explained, and to what extent it will be carried into execution; and consequently, whether in any case, the *United States* can be involved in questions concerning measures of retaliation, supposed to accrue to one belligerent, from such a proceeding, by another. But it is worthy the justice and the liberality of the *British* government, to recollect, that within the period of those great events, which continue to agitate *Europe*, instances have occurred, in which the commerce of neutral nations, more especially of the *United States* has experienced the severest distresses from its own orders and measures, manifestly unauthorized by the law of nations. The respect which the *United States* owe to their neutral rights, and the interest they have in maintaining them, will always be sufficient pledges, that no culpable acquiescence on their part, will render them accessory to the proceedings of one belligerent nation, through their rights of neutrality, against the commerce of its adversary.

With regard to the particular order issued against the trade of neutrals, from one port to another of the enemies of *Great*

Britain, no fair objection can lie against it, provided it be founded on, and enforced by, actual blockades as authorized by the law of nations. If, on the other hand, the order has reference, not to such a blockade, but to a supposed illegality of the neutral trade from one to another of the described ports, the remark is obvious, that on that supposition, the order is superfluous; the trade being, as interdicted by the law of nations, liable at all times, without any such order, to the capture of *British* cruisers and the condemnation of *British* courts; and if not interdicted as such by the law of nations, it can no otherwise be made illegal, than by a legal blockade of the ports comprehended in the order. This inference is applicable even to the case of a neutral trade between the ports of *France* herself; since it is not a principle of the acknowledged law of nations, that neutrals may not trade from one to another port of the same belligerent nation. And it would be an innovation on that law, not before attempted, to extend the principle to a neutral trade between ports of different countries, confessedly open in times of peace as well as of war.

If the *British* order refers for its basis, to the principle of retaliation against the *French* decree, it falls under the observations already made on that subject, and which need not be repeated.

I am, &c.

(Signed) JAMES MADISON.

Hon. David M. Erskine, &c. &c.

Mr. Madison to Mr. Erskine.

Department of State, March 25, 1808.

SIR,

Having laid before the president your letter of the 23d of *February*, explaining the character of certain *British* orders of council issued in *November* last, I proceed to communicate the observations and representations, which will manifest to

your government the sentiments of the president on so deep a violation of the commerce and rights of the *United States*.

These orders interdict to neutral nations, or rather to the *United States*, now the only commercial nation in a state of neutrality, all commerce with the enemies of *Great Britain*, now nearly the whole commercial world, with certain exceptions only, and under certain regulations, but too evidently fashioned to the commercial, the manufacturing, and the fiscal policy of *Great Britain;* and, on that account, the more derogatory from the honour and independence of neutral nations.

The orders are the more calculated to excite surprise in the *United States*, as they have disregarded the remonstrances conveyed in my letters of the 20th and 29th of *March* 1807, against another order of council, issued on a similar plea, in the month of *January* 1807. To those just remonstrances no answer was indeed ever given; whilst the order has continued in its pernicious operation against the lawful commerce of the *United States;* and we now find added to it, others, instituting still more ruinous depredations, without even the addition of any new pretext: and when, moreover, it is notorious that the order of *January* was of a nature greatly to overbalance, in its effects, any injuries to *Great Britain* that could be apprehended from the illegal operation of the *French* decree, on which the order was to retaliate, had that decree, in its illegal operation, been actually applied to the *United States*, and been acquiesced in by them.

The last orders, like that of *January*, proceed on the most unsubstantial foundation. They assume for fact, an acquiescence of the *United States*, in an unlawful application to them of the *French* decree: and they assume for a principle, that the right of retaliation accruing to one belligerent is not to have for its measure that of the injury received; but may be exercised in any extent, and under any modifications, which may suit the pleasure or the policy of the complaining party.

The fact, sir, is unequivocally disowned. It is not true that the *United States* have acquiesced in an illegal operation of the *French* decree: nor is it even true, that at the date of the *Bri-*

tish orders of *November* 11, a single application of that decree to the commerce of the *United States*, on the high seas, can be presumed to have been known to the *British* government.

The *French* decree in question has two distinct aspects; one clearly importing an intended operation within the territorial limits as a local law; the other apparently importing an intended operation on the high seas.

Under the first aspect, the decree, however otherwise objectionable, cannot be said to have violated the neutrality of the *United States*. If the governing powers on the continent of *Europe* choose to exclude from their ports, *British* property or *British* productions, or neutral vessels proceeding from *British* ports, it is an act of sovereignty which the *United States* have no right to controvert. The same sovereignty is exercised by *Great Britain*, at all times, in peace as well as in war, towards her friends as well as her enemies. Her statute book presents a thousand illustrations.

It is only, therefore, under the other aspect of the decree, that it can have violated neutral rights: and this would have resulted from its execution on the high seas, whether on the pretext of a nominal blockade, or with a view to enforce a domestic regulation against foreign vessels, not within the domestic precincts, but under the authority and protection of the law of nations.

Had then the *French* decree been executed on the high seas against the commerce of the *United States* with *Great Britain?* and have the *United States* acquiesced in the unlawful and injurious proceeding?

I state, sir, on undeniable authority, that the first instance, in which that decree was put in force against the neutral rights of the *United States*, was that of the *Horizon*, an *American* ship bound from *Great Britain* to *Lima*, wrecked within the territorial jurisdiction of *France*, but condemned under an exposition of the decree, extending to the high seas its operation against neutrals. This judicial decision took place as late as the 16th day of *October* 1807, and was not officially known to the minister plenipotentiary of the *United States* at *Paris* till some

time in *November*. At the date, therefore, of the first order of *Great Britain*, no injury whatever had been done to her, through an aggression on the commerce of the *United States*. No presumption even had been sufficiently authorized, that the express stipulations in the treaty of *France* with the *United States* would not exempt their commerce, at least, from the operation of any edict incompatible with them. At the date even of the latter orders of *November* 11, it appears that the only aggression, which had then occurred, was pretty certainly unknown to the *British* government, and could therefore have had no share in producing this alleged retaliation.

To the fact, that the case of the ship *Horizon* was the first that occurred, of an execution of the *French* decree on the high seas, I am able to add, that as late as the 30th of *November*, no other case had been brought into the *French* court of prizes. From accounts which have lately appeared, it is more than probable that unlawful captures by *French* cruisers have since taken place; but it remains to be known whether they are to be referred to the concurrence of the *French* government in the judgment pronounced in the case of the *Horizon*, or not rather to a *French* decree of the 17th of *December* last, professing to be a retaliation on the *British* orders of *November* 11.

I state with equal confidence, that at no time have the *United States* acquiesced in violations of their neutral rights injurious to *Great Britain*, or any other belligerent nation. So far were they, in particular, from acquiescing in the *French* decree of *November* 1806, that the moment it was known to their minister at *Paris*, he called for explanations of its meaning in relation to the *United States*, which were favourable, and uncontradicted by the actual operation of the decree; that he steadily watched over the proceedings under it, with a readiness to interpose against any unlawful extension of them to the commerce of the *United States;* that no time was lost, after the decree came to the knowledge of the government here, in giving him proper instructions on the subject; that he was equally prompt, on receiving the decision of the court in the case of the *Horizon*, in presenting to the *French* government a remon-

strance in terms which can never be censured for a defect of energy; and that by the first opportunity, after that decision reached the president, the particular instructions required by it were forwarded to that minister. Nor is it to be forgotten, that previous to the *British* orders of *November*, it had been explicitly communicated to the *British* government, by the *American* minister at *London*, that explanations, uncontradicted by any overt act, had been given to our minister at *Paris*, which justified a reliance, that the *French* decree would not be put in force against the *United States;* and that the communication was repeated to the *British* government immediately on the publication of those orders.

What more could have been required on the part of the *United States*, to obviate retaliating pretensions of any sort on the part of *Great Britain?* Retaliations are measures of rigour in all cases. Where they are to operate through a third and involuntary party, they will never be hastily resorted to, by a magnanimous or a just power; which will always allow to the third party, its right to discuss the merits of the case, and will never permit itself to enforce its measures without affording a reasonable time, for the use of reasonable means, for substituting another remedy. What would be the situation of neutral powers, if the first blow levelled through them by one belligerent against another, was to leave them no choice but between the retaliating vengeance of the latter, and an instant declaration of war against the former? Reason revolts at this, as the sole alternative. The *United States* could no more be bound to evade the *British* orders, by an immediate war with *France*, than they were bound to atone for the burning of the *French* ship of war on the shore of *North Carolina*, by an immediate resort to arms against *Great Britain*.

With respect to the principle assumed by the *British* orders, it is perfectly clear, that it could not justify them in the extent given to their operation, if the facts erroneously assumed could have been fully sustained.

Retaliation is a specific or equivalent return of injury, for injury received; and where it is to operate through the interests

of a third party, having no voluntary participation in the injury received, the return ought, as already observed, to be inflicted with the most forbearing hand.

This is the language of common sense, and the clearest equity. As the right to retaliate results merely for the wrong suffered, it cannot, in the nature of things, extend beyond the extent of the suffering. There may often be a difficulty in applying this rule with exactness, and a reasonable latitude may be allowable on that consideration. But a manifest and extravavagant departure from the rule can find no apology.

What then is the extent of the injury experienced by *Great Britain* from the measures of her enemies, so far as the operation of those measures through the *United States*, can render them in any sense responsible?

A mere declaration by a belligerent, without the intention or the means to carry it into effect against the rights and obligations of a neutral nation, and thence against the interests of another belligerent, could afford no pretext to the latter, to retaliate at the expense of the neutral. The declaration might give just offence to the neutral, but it would belong to him alone to decide on the course prescribed by the respect he owed to himself. No real damage accruing to the belligerent, no indemnity could accrue.

For the same reason, a declaration of a belligerent which he is known to be either not in a situation, or not to intend to carry, but partially, into execution against a neutral, to the injury of another belligerent, could never give more than a right to a commensurate redress against the neutral. All remaining unexecuted, and evidently not to be executed, is merely ostensible; working no injury to any, unless it be in the disrespect to the neutral, to whom alone it belongs to resent or disregard it.

Bring the case before us to this plain and equitable test. The *French* decree of *November* 1806, undertook to declare the *British* isles in a state of blockade, to be enforced, if you please, against the neutral commerce of the *United States*, on the high seas, according to the faculty possessed for the purpose. As far as it was actually enforced, or an effect resulted from an appre-

hension that it could and would be enforced, it was an injury to *Great Britain*, for which, let it be supposed, the *United States* were answerable. On the other hand as far as it was not enforced, and evidently either would not or could not be enforced, no injury was experienced by *Great Britain*, and no remedy could lie against the *United States*. Now, sir, it never was pretended that, at the date of the first *British* order, issued in *January* 1807, any injury had accrued to, or was apprehended by *Great Britain*, from an execution of the *French* decree against the commerce of the *United States*, on the theatre of their neutral rights: so far from it, that the order stands self-condemned as a measure of retaliation, by expressly stating that the fleets of *France* and her allies, instead of being able to enforce the blockade of the *British* isles, were themselves confined to their own ports, by the entire superiority of the *British* navy: converting thus, by the strangest of reasonings, the security of *Great Britain* against injury from the *French* decree, into a title to commit injury on a neutral party. In the *November* orders also, whilst it is admitted that the *French* decree could not be but imperfectly executed, for want of means, it is asserted that the intention of the *French* decree, and not the injury accruing from its operation through the commerce of the *United States*, is the scale by which the retaliating injury against them is to be measured.

Such are the pretexts, and such the principles, on which one great branch of the lawful commerce of this country became a victim to the first *British* order, and on which the last orders are now sweeping from the ocean all its most valuable remains.

Against such an unprecedented system of warfare on neutral rights, and national independence, the common judgment and common feelings of mankind must for ever protest.

I touch, sir, with reluctance, the question, on which of the belligerent sides the invasion of neutral rights had its origin. As the *United States* do not acquiesce in these invasions by either, there could be no plea for involving them in the controversy. But as the *British* orders have made the decree of

France, declaring, contrary to the law of nations, the *British* islands in a state of blockade, the immediate foundation of their destructive warfare on our commerce, it belongs to the subject to remind your government of the illegal interruptions and spoliations suffered, previous to that decree, by the neutral commerce of the *United States*, under the proceedings of *British* cruisers and courts, and for the most part, in consequence of express orders of the government itself. Omitting proofs of inferior note, I refer to the extensive aggressions on the trade of the *United States* founded on the plea of blockades never legally established according to recognized definitions; to the still more extensive violations of our commerce, with ports of her enemies not pretended to be in a state of blockade; and to the *British* order of council issued near the commencement of the existing war. This order, besides its general interpolation against the established law of nations, is distinguished by a special ingredient, violating that law as recognized by the course of decisions in the *British* courts. It subjects to capture and condemnation all neutral vessels, returning with lawful cargoes, on the sole consideration, that they had, in their outward voyage, deposited contraband of war at a hostile port.

If the commerce of the *United States* could, therefore, in any case, be reasonably made the victim and the sport of mutual charges and reproaches between belligerent parties, with respect to the priority of their aggressions on neutral commerce, *Great Britain* must look beyond the epoch she has chosen, for illegal acts of her adversary, in support of the allegation on which she founds her retaliating edicts against our commerce.

But the *United States* are given to understand, that the *British* government has, as a proof of its indulgent and amicable disposition towards them, mitigated the authorized rigour it might have given to its measures, by certain exceptions peculiarly favourable to the commercial interests of the *United States*.

I forbear, sir, to express all the emotions with which such a language, on such an occasion, is calculated to inspire a nation

which cannot for a moment be unconscious of its rights, nor mistake, for an alleviation of wrongs, regulations, to admit the validity of which would be to assume badges of humiliation never worn by an independent power.

The first of these indulgences is a commercial intercourse with the dependencies of the enemies of *Great Britain*, and it is considered as enhanced by its being a deviation in favour of the *United States*, from the ancient and *established* principle of maritime law, prohibiting altogether such an intercourse in time of war.

Surely, sir, your government, in assuming this principle, in such terms, in relation to the *United States*, must have forgotten their repeated and formal protests against it, as these are to be found in the discussions and communications of their minister at *London*, as well as in explanations occasionally made on that subject to the *British* representative here. But permit me to ask more particularly, how it could have happened, that the principle is characterized as an ancient and established one? I put the question the more freely, because it has never been denied that the principle, as asserted by your government, was for the first time introduced during the war of 1750. It is, in fact, invariably cited and described, in all judicial and other official transactions, "as the rule of 1750." It can have no pretension, therefore, to the title of an *ancient* rule.

And instead of being an *established* rule or principle, it is well known that *Great Britain* is the only nation that has acted upon, or otherwise given a sanction to it. Nay, it is not even an established principle in the practice of *Great Britain* herself. When first applied in the war of 1756, the legality of a neutral trade with enemy's colonies was not contested by it. In certain cases only of the colonial trade the allegation was, that the presumptive evidence arising from circumstances, against the bona fide neutrality of the ownership, justified the condemnation as of enemy's property. If the rule of condemnation was afterwards, during that war, converted into the principle now asserted, it could not possibly have been in operation, in its new shape, more than a very few years. During the succeeding

war of 1778, it is admitted by every *British* authority, that the principle was never brought into operation. It may be regarded in fact, as having been silently abandoned. And within the period of war since its commencement in 1793, the manner in which the principle has been alternately contracted and extended, explained sometimes in one way, sometimes in another, rested now on this foundation, now on that, is no secret to those who have attended to its history and progress in the *British* orders of council, and the *British* courts of admiralty.

With the exception, therefore, of a period, the last in modern times from which authentic precedents of maritime law will be drawn, and throughout which the *United States*, more interested in the question than any other nation, have uniformly combated the innovation, the principle has not in the *British* tribunals been in operation for a longer term than three, four or five years, whilst in no others has it ever made its appearance but to receive a decision protesting against it.

Such is the antiquity, and such the authority of a principle, the deviations from which are held out as so many favours consoling the *United States* for the wide spread destruction of their legitimate commerce.

What must be said as to the other exceptions which seem to have been viewed as claims on the gratitude of the *United States?* Is it an indulgence to them in carrying on their trade with the whole continent of *Europe*, to be laid under the necessity of going first to a *British* port, to accept a *British* license, and to pay a tribute to the *British* exchequer, as if we had been reduced to the colonial situation which once imposed these monopolizing restraints?

What again must be said as to the other features which we see blended on the face of these regulations? If the policy of them be to subject an enemy to privations, why are channels opened for a *British* trade with them which are shut to a neutral trade? If, in other cases, the real object be to admit a neutral trade with the enemy, why is it required that neutral vessels shall perform the ceremony of passing through a *British* port, when it can have no imaginable effect but the known

and inevitable one of prohibiting the admission of the trade into the port of destination?

I will not ask why a primary article of our productions and exports, cotton-wool, is to be distinguished, in its transit, by a heavy impost, not imposed on other articles, because it is frankly avowed, in your explanation of orders, to be intended as an encouragement to *British* manufactures, and a check to the rival ones of *France?* I suppress, also, though without the same reason for it, the inquiry, why less rigorous restrictions are applied to the trade of the *Barbary* powers, than are enforced against that of a nation, such as the *United States*, and in relations, such as have existed between them and *Great Britain*.

I cannot, however, pass without notice the very unwarrantable innovations, contained in the two last of the orders. In one of them, a certificate of the local origin of a cargo, although permitted in the port of departure, and required in the port of destination, by regulations purely domestic in both, and strictly analogous in principle to regulations in the commercial code of *Great Britain*, is made a cause of capture on the high seas, and of condemnation in her maritime courts. In the other order, the sale of a merchant ship, by a belligerent owner to a neutral, although a transaction as legal, when fair, as a dealing in any other article, is condemned by a general rule, without an atom of proof, or of presumption, that the transfer in the particular case, is fraudulent, and the property, therefore, left in an enemy.

In fine, sir, the president sees in the edicts communicated by you, facts assumed which did not exist; principles asserted, which never can be admitted; and, under the name of retaliation, measures transcending the limits reconcilable with the facts and the principles, as if both were as correct as they are unfounded. He sees, moreover, in the modifications of this system, regulations, violating equally our neutral rights and our national sovereignty. He persuades himself, therefore, that your government will see in the justice of the observations now made in addition to those I had the honour, verbally, to

state to you in the first instance, that the *United States* are well warranted in looking for a speedy revocation of a system, which is every day augmenting the mass of injury for which the *United States* have the best of claims to redress.

I have the honour to be,
With great respect and consideration,
Sir, yours, &c. &c.
(Signed) JAMES MADISON.

The Hon. David M. Erskine, &c. &c.

From Mr. Madison to Mr. Erskine.

Department of State, March 29th. 1807.

SIR,

Further reflection on the tenor and tendency of the order of his *Britannic* majesty, communicated by your letter of the 12th instant, which was answered by mine of the 20th, induces me to resume that important subject.

From the difficulty of supposing that the order can have for its basis, either a legal blockade impossible to be extended to all the ports described in the order, or a supposed illegality of the trade, between those ports, an illegality which has never been applied by the *British* government or its admiralty courts to an *accustomed* trade, even between the ports of the same belligerent nation, and is utterly at variance with the conduct of both in reference to a trade between a belligerent nation and its allies; a necessity seems to result of ascribing the order to the policy of countervailing, through the commerce of neutrals, the *French* decree of the 21st of *November* last.

In this view of the order, it demands, on the part of the *United States*, the most serious attention both to its principle, and to its operation.

With respect to its *principle*, it will not be contested that a retaliation by one nation on its enemy, which is to operate through the interest of a nation not an enemy, essentially requires not only that the injury inflicted should be limited by

the measure of injury sustained; but that every retaliating step, in such a case, should be preceded by an unreasonable failure of the neutral party to put an end, in some mode or other, to the inequality wrongfully produced.

Were it certain, therefore, that the *French* decree is to be enforced in the sense in which it is taken, and that in violation of the treaty between *France* and the *United States*, the commerce of the latter will not be exempted; the *British* order, being peremptory in its import, and immediate in its execution, might justly be regarded by the *United States*, as a proceeding equally premature and unfriendly.

But in the uncertainty as to the real meaning of that decree; and whilst a presumption offered itself, that the decree, if avowed and executed in an unlawful extent, might not embrace the commerce of the *United States*, they are bound by justice to their interests, as well as by respect for their rights, to consider the *British* order as a ground for serious complaint and remonstrance.

Should it prove that the decree had not the meaning ascribed to it, and particularly, should the respect of *France* for her treaties with the *United States* exempt their trade from the operation of the decree, the order of the *British* government will stand exposed to still severer comments. It will take the character of an original aggression, will furnish the *French* government, a like ground with that assumed by itself, for retaliating measures, and will derive a very unfavourable feature from the consideration, that it was a palpable infraction of a treaty just signed on the part of the *British* government, and expected, at the date of the order, to be speedily ratified on the part of the *United States*.

The necessity of presenting the subject in its true light, is strengthened by the *operation* which the *British* order will have on a vast proportion of the entire commerce of the *United States*. Not to dwell on the carrying branch of the commerce between the ports and countries of *Europe*, and which the immunity given by our flag in consequence of treaties with the enemies of *Great Britain*, to *British* property, and not enjoyed

by the property of her enemies, has hitherto been advantageous to *Great Britain;* and without inquiring into the effect of an application of the interdict, to the other quarters of the globe, all of which are evidently within the comprehensive terms of the order, it cannot be overlooked, that the character and course of nearly the whole of the *American* commerce with the ports of *Europe*, other than of *Great Britain*, will fall under the destructive operation of the order. It is well known that the cargoes exported from the *United States*, frequently require that they be disposed of, partly at one market, and partly at another. The return cargoes are still more frequently collected at different ports; and not unfrequently, at ports different from those receiving the outward cargoes. In this circuitous voyage, generally consisting of several links, the interest of the undertakers materially requires also either a trade or a freightage between the ports visited in the circuit. To restrain the vessels of the *United States*, therefore, from this legitimate and customary mode of trading with the continent of *Europe*, as is contemplated by the order, and to compel them on one hand to dispose of the whole of their cargoes at a port which may want but a part, and, on the other hand, to seek the whole of their returns at the same port, which may furnish but a part or perhaps no part of the articles wanted, would be a proceeding as ruinous to our commerce, as contrary to our essential rights.

These observations, which are made in conformity with the sentiments of the president, cannot fail, sir, to have all the weight with an enlightened and friendly government, to which they are entitled; and the president persuades himself, that the good effect of the truths which they disclose, will be seen in such measures as will remove all ground for dissatisfaction, and demonstrate, on that side, the same sincere disposition to cultivate harmony and beneficial intercourse, as is felt and evinced by the *United States* and their government.

I have the honour to be, &c.

(Signed) JAMES MADISON.

The Hon. David M. Erskine, Esqr.

REPORT

Of the Judges of the Supreme Court of the Commonwealth of Pennsylvania, made in pursuance of a Resolution of the Legislature of the said Commonwealth. Passed in the Session 1807-8: reported to the Senate and House of Representatives, on the 19th and 20th of December 1808.

To the Honorable the Senate and
House of Representatives of the Commonwealth of Pennsylvania.

THE undersigned judges of the supreme court of the said commonwealth, respectfully submit their report of the *English* statutes which are in force in the said commonwealth, and of those of the said statutes, which in their opinion, ought to be incorporated into the statute laws of the said commonwealth.

They have taken the liberty, at the same time, of submitting a few preliminary observations, connected with the subject of the report, and tending to explain the principles which have governed them, in the execution of the trust which the legislature have been pleased to confide in them.

The subject is divided into two branches. 1st. The ascertaining of such *English* statutes as are in force in this commonwealth. 2d. The opinion of the judges, which of the statutes so in force are proper to be incorporated into the statute laws of the commonwealth.

In order to accomplish the first part of the subject, it was necessary to begin with the consideration of the present constitution of the commonwealth. It contains nothing particular as to the point in question. There is a general provision, that all laws of this commonwealth, in force at that time, and not inconsistent with the said constitution, and all rights, &c. should continue as if the said alterations and amendments had not been made. The question still remained unanswered, what laws were in force; it appeared upon tracing the matter further back, that an act was passed on the 28th January 1777, entitled, "An act to revive and put in force, such and so much of the state

laws of the province of Pennsylvania, as is judged necessary to be in force in this commonwealth." In this act it is provided, that the common law, and such of the statute laws of *England* as have been heretofore in force in the said province, shall be in force, except as is hereafter excepted. The exception relates to the oath of allegiance to the king of *Great Britain*, the acknowledgment of any authority in the heirs of *William Penn*, the first proprietar , the laws ascertaining the number of members of assembly in any county, the time of election and qualification of electors, the *English* statutes relating to treason or misprision of treason, and such laws or acts of assembly as declared, ordered or directed, any thing inconsistent with the then existing constitution of the commonwealth.

Still the point remained open; what *English* statutes were in force in Pennsylvania? It became necessary therefore to mount up to the first sources of information; the charter granted to *William Penn*, and the general principles of colonization.

It is provided by the charter, that the laws for the regulating and governing of property, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, and likewise as to felonies, within the said province, shall be and continue the same as they shall be for the time being, by the general course of the law in the kingdom of *England*, until the said laws shall be altered by the said *William Penn*, his heirs or assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them. Notwithstanding the generality of these expressions, it has always been held, that many of the *English* laws, relating both to property and to felonies, would have been improper for the state of things in an infant colony; and accordingly they were never practically extended here. It is the true principle of colonization, that the emigrants from the mother country carry with them, such laws as are useful in their new situation, and none other. A multitude of *English* statutes, relating to the king's prerogative, the rights and privileges of the nobility and clergy, the local commerce and revenue of *England*, and other subjects unnecessary to enumerate, were improper to

be extended to *Pennsylvania*. In order to execute the duty required of them, it was necessary for the judges to examine the code of *English* statute law from the beginning to the time of the settlement of *Pennsylvania;* and to weigh deliberately which of them were proper to be adopted. But this was not all; it was essential that our own statute book should be examined, to see in what cases the *English* law had been altered, or in what cases it had been expressly extended here. Wherever our own legislature had enacted a law, on the same subject on which an *English* statute was to be found, it has been supposed that the *English* statute had no force here, even though it contained more extensive provisions than our own act of Assembly; because it was reasonable to presume, that our assembly was acquainted with the *English* statute, and designedly omitted some of its provisions.

Besides these inquiries, it was necessary to ascertain what had been the decision of our own courts, respecting the extension of *English* statutes. This was no easy task, as we have no printed reports prior to our revolution, of cases determined in our courts of justice. Of course these decisions are only to be known by tradition, or manuscript notes in the possession of gentleman of the bar, or the judges.

With respect to *English* statutes enacted since the settlement of *Pennsylvania*, it has been assumed as a principle, that they do not extend here, unless they have been recognized by our acts of assembly, or adopted by long continued practice in courts of justice. Of the latter description there are very few, and those, it is supposed, were introduced from a sense of their evident utility. As *English* statutes they had no obligatory force, but from long practice they may be considered as incorporated with the law of our country.

Having endeavoured to ascertain the *English* statutes which were in force, the judges proceeded to the second part of the subject; the consideration of which of these statutes were proper to be incorporated with our own law. They felt that this part of their task, though very honourable, was very arduous, and in executing it, they have thought themselves

bound to proceed with great caution. In works which consist in the alteration of long established usages, it is safer to do too little than too much. The most experienced builder, cannot always calculate the exact effect of removing a stone. If further alterations should be necessary, it is always competent to the legislature to make them. It will be found by the report, that in a number of cases, the repeal of *English* statutes is recommended. In a number of others which appeared doubtful, it was thought best, to leave them for further experience.

In perusing the statutes referred to in the report, the legislature will perceive, that in many of them, the language is uncouth and unsuited to our present form of government. In many of them too, they will find here and there a sentence not properly applicable to any other country than *England.* There is no other way of curing these defects than by reenacting the substance of these statutes in language suitable to our present condition, which might be attended with the additional advantage of simplifying the statute law, by reducing into one, several acts passed on the same subject. This would be a work of labour. Something of the kind has been done in the states of *Virginia* and *New York*, but it is believed that several years were employed in the performance.

From the outline which has been drawn, the legislature will easily perceive the difficulties attending the report now presented to them, and their candour will induce them to bear in mind, that it has been executed during the short intervals of official occupation. The judges dare not flatter themselves, that the performance approaches to perfection. They trust, however, that it will not be found more defective than might reasonably be expected.

WM. TILGHMAN,
J. YEATES,
THOMAS SMITH,
H. H. BRACKENRIDGE.

December 14, 1808.

REPORT of the Judges of the Supreme Court of Pennsylvania of the English Statutes, which are in force in the Commonwealth of Pennsylvania; and of those of the said Satutes which, in their opinion, ought to be incorporated into the Statute Laws of the said Commonwealth.

N. B. Ruffhead's edition of the English Statutes at large, is referred to in this Report. The opinion of the Judges is expressed under the title of each statute, whether the same ought to be incorporated.

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 3	9th Henry III. chap. 7.	"A widow shall have her "marriage, inheritance and "quarantine." That part only of this statute is in force which provides, that a widow shall tarry in the chief house of her husband 40 days after her husband's death, within which days her dower shall be assigned her.—*To be incorporated.*
Id. 9	9th Henry III. chap. 34.	"In what only case a wo- "man shall have an appeal of "death."—*Not to be incorporated.*
Id. 16	20th Henry III. chap. 1.	"A woman shall recover "damages in a writ of dow- er."—*To be incorporated.*
Id. 16	20th Henry III. chap. 2.	"Widows may bequeath "the crops of their lands."—*To be incorporated.*
Id. 16	20th Henry III. chap. 3.	"Inquiry and Punishment "of Redisseisin."—*To be incorporated.*
Id. 19	20th Henry III. chap. 9.	"He is a Bastard that is "born before the marriage of "his parents."—*To be incorporated.*
Id. 20	21st Henry III.	"The day of the Leap "Year, and the day before, "shall be holden for one "day."—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 31	52d Henry III. chap. 4.	"A Distress shall not be "driven out of the county, "and it shall be reasona- "ble."—*To be incorporated.*
Id. 35	52d Henry III. chap. 8.	"The punishment of those "who commit Redisseisin."—*To be incorporated.*
Id. 35	52d Henry III. chap. 13.	"After issue joined there "shall be but one Essoin or "one default."—*Not to be incorporated.*
Id. 36	52d Henry III. chap. 15.	"In what places, Distresses "shall not be taken."—*To be incorporated.*
Id. 37	52d Henry III. chap. 17.	"The authority and duty of "Guardian in Socage."—*To be incorporated.*
Id. 39	52d Henry III. chap. 29.	"In what case a writ of "Entry sur Disseissin in the "post doth lie."—*To be incorporated.*
Id. 43	3d Edward I. chap. 9.	"All men shall be ready to "pursue Felons." That part only of this statute is in force which provides that "all, generally, shall be "ready at the commandment "and summons of sheriffs, and "at the cry of the country, "to pursue and arrest Felons, "where any need is."—*To be incorporated.*
Id. 54	3d Edward I. chap. 40.	"Voucher to warranty and "counter pleading of vouch- "er."—*To be incorporated.*
Id. 56	3d Edward I. chap. 42.	"Certain actions, wherein "after appearance the tenant "shall not be essoined."—*Not to be incorporated.*
Id. 56	3d Edward I. chap. 43.	"There shall be no Four- "cher by Essoin."—*Not to be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 56	3d Edward I. chap. 44.	"In what case, Essoin ultra "mare, shall not be allow-"ed."—*Not to be incorporated.*
Id. 57	3d Edward I. chap. 47.	"In what case the nonage "of the heir of the Disseissor "or Disseisee, shall not pre-"judice." The whole of this statute is in force, except those parts which relate to Prelates, men of Religion, and writs of attaint.—*To be incorporated.*
Id. 58	3d Edward I. chap. 49.	"The tenant's plea in a writ "of dower."—*To be incorporated.*
Id. 60	4th Edward I. statute 2d.	"Concerning the duty of a "Coroner." This statute is in force, except those parts, which relate to the Coroner's duty in the following points viz:—making inquiry as to the property of any person, or seizing the property of any person—Treasure that is found—appeal of rape or of wounds, or any other appeals—Deodands—and wrecks of the sea—and also except that part which provides, that land shall remain in the king's hands, until the lords of the Fee, have made fine for it.—*To be incorporated.*
Id. 65	6th Edward I. chap. 1.	"Several actions wherein "damages shall be recover-"ed."—*To be incorporated.*
Id. 65	6th Edward I. chap. 2.	"In what case nonage of "the Plaintiff shall not stay an "inquest."—*To be incorporated.*
Id. 65	6th Edward I. chap. 3.	"An alienation of land by "the tenant, by the courtesy

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 65	6th Edward I. chap. 3.	" with warranty shall be " void."—*To be incorporated.*
Id. 66	6th Edward I. chap. 5.	" Several tenants against " whom an action of waste is " maintainable." The whole of this Statute is in force, except that part which relates to waste in the time of wardship, which is not applicable to this country.—*To be incorporated.*
Id. 66	6th Edward I. chap. 6.	" Where divers heirs shall " have one assize of Mort " D'Ancestor."—*To be incorporated.*
Id. 68	6th Edward I. chap. 10.	" The husband and wife be- " ing impleaded, shall not " fourch by Essoin."—*Not to be incorporated.*
Id. 69	6th Edward I. chap. 13.	" No waste shall be made, " hanging a suit for the land." —*To be incorporated.*
Id. 78	13th Edward I. stat. 1. chap. 1.	" In gifts in tail the Donor's " will shall be observed. The " form of a Formedon." This statute is in force except such part as has been altered by an act of Assembly passed 27th January 1749, (old style) entitled " An act for barring estates Tail," and an other act passed 16th January, 1799, entitled " An act to facilitate the barring of entails."—*To be incorporated.*
Id. 81	13th Edward I. stat. 1. chap. 3.	" A Cui in vita for the wife " —when a wife or he in re- " version shall be received."— *To be incorporated.*
Id. 82	13th Edward I. stat. 1. chap. 4.	" Where the wife shall be " endowable of lands recover- " ed against her husband.—

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 82	13th Edward I. stat. 1. chap. 4.	"Where the heir may avoid a "Dower recovered—A reme- "dy for particular tenants los- "ing by default." This statute is in force, except that part which relates to proceedings in a writ of right. —*To be incorporated.*
Id. 86	13th Edward I. stat. 1. chap. 6.	"The penalty if a tenant "impleaded, voucheth, and "the vouchee denieth his war- "ranty."—*To be incorporated.*
Id. 86	13th Edward I. stat. 1. chap. 7.	"Admeasurement of Dow- "er for the Guardian and the "Heir, and the process there- "in."—*To be incorporated.*
Id. 90	13th Edward I. stat. 1. chap. 11.	"The master's remedy "against their servants, and "other accountants."—*To be incorporated.*
Id. 91	13th Edward I. stat. 1. chap. 12.	"The appellant being ac- "quitted, the appellor and "abettors shall be punished— "There shall be no essoin for "the appellor."—*Not to be incorporated.*
Id. 92	13th Edward I. stat. 1. chap. 14.	"The process in an action "of waste—a writ to inquire "of waste."—*To be incorporated.*
Id. 92	13th Edward I. stat. 1. chap. 15.	"An infant eloined may "sue by Prochein Amy." *To be incorporated.*
Id. 93	13th Edward I. stat. 1. chap. 17.	"In what case Essoin de "malo lecti doth lie, and "where."—*Not to be incorporated.*
Id. 94	13th Edward I. stat. 1. chap. 20.	"The tenant's answer, in "a writ of Cossinage, Aiel or "Besaiel."—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 94	13th Edward I. stat. 1. chap. 22.	"Waste maintainable by one " tenant in common against " another."—*To be incorporated.*
Id. 95	13th Edward I. stat. 1. chap. 23.	" Executors may have a " writ of account."—*To be incorporated.*
Id. 95	13th Edward I. stat. 1. chap. 24.	" A writ of a nuisance of " house &c. levied and aliened " to another—A Quod per- " mittat, and juris utrum, for " a parson of a church—In " like cases, like writs be " grantable." This statute is in force, except those parts which relate to ecclesiastical persons.—*To be incorporated.*
Id. 95	13th Edward I. stat. 1. chap. 25.	" Of what things an assize " shall lie—Certificate of as- " size—Attachment in an as- " size." This statute is in force, except that part which gives the remedy by assize in cases of keeping of parks, woods, forests, chases, warrens, gates, and other bailiwicks and offices, in fee—Also that part which gives an immediate remedy by assize, in case any person holding land for term of years, aliens the same in Fee, and by such alienation the Freehold is transferred to the Feoffee—Also that part which authorizes the Sheriff to take an ox for his fee.—*To be incorporated.*
Id. 97	13th Edward I. stat. 1. chap. 26.	" Who may bring a writ of " Redisseisin, and the punish- " ment of the offender there- " in."—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 97	13th Edward I. stat. 1. chap. 27.	" Essoin after inquest, but " none after day given Prece " Partium."—*Not to be incorporated.*
Id. 98	13th Edward I. stat. 1. chap. 30.	" The authority of justices " of Nisi Prius—Adjournment of Suits—Certain writs " that be determinable in their " proper counties—A Jury " may give their verdict at " large—None but which were " summoned shall be put in " assizes or juries." The following parts only of this statute are in force—Sec. 3, and when such inquests be taken they shall be returned into the Bench and there shall judgment be given, and there they shall be enrolled. The Justices of Nisi Prius shall have clerks, to enrol all pleas pleaded before them.—The said Justices shall not compel the Jurors to say precisely whether it be a Disseisin or not, so that they show the truth of the deed, and require aid of the said Justices.—But if they, of their own head, will say that it is a Disseisin, their verdict shall be admitted at their own peril.—*To be incorporated.*
Id. 99	13th Edward I. stat. 1. chap. 31.	" An exception to a plea " shall be sealed by the Justices."—*To be incorporated.*
Id. 101	13th Edward I. stat. 1. chap. 34.	" It is felony to commit a " rape—A married woman " elopeth with an avowterer " —The penalty of carrying a " man from his house."

Book and Page.		Year and Reign.	Titles of the Statutes.
1 Ruffhead	101	13th Edward I. stat. 1. chap. 34.	That part only of this statute is in force, which enacts, that "if a wife willingly leave her husband and go away, and continue with her avowterer, she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except that her husband willingly reconcile her and suffer her to dwell with him, in which case she shall be restored to her action. —*To be incorporated.*
Id.	104	13th Edward I. stat. 1. chap. 39.	"The manner to deliver "writs to the Sheriff to be exe- "cuted.—The Sheriff return- "eth 'a Liberty,' when none "is returning of issues.—Re- "sistance of execution of pro- "cess." Those parts only of this statute are in force which define "what shall be accounted issues" direct the punishment of the Sheriff for false returns, give authority to the Sheriff to do certain things, in case of resistance of the execution of Process, and direct the punishment of those who resist the execution of Process.—*To be incorporated.*
Id.	106	13th Edward I. stat. 1. chap. 40.	"A woman's suit shall not "be deferred by the minority "of the heir."—*To be incorporated.*
Id.	109	13th Edward I. stat. 1. chap. 45.	"The process of execution "of things recorded within "the year or after."—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 123	18th Edward I. stat. 2d.	"Statute of Quo Warran-" to."—*To be incorporated.*
Id. 123	18th Edward I. stat. 3d.	"Another new statute of "Quo Warranto."—*To be incorporated.*
Id. 124	18th Edward I. stat. 4th.	"The manner of levying Fines."—*To be incorporated.*
Id. 125	20th Edward I. stat. 1st.	"The statute of Vouchers."*To be incorporated.*
Id. 126	20th Edward I. stat. 2d.	"A statute of Waste."—*To be incorporated.*
Id. 127	20th Edward I. stat. 3d.	"Statute De Defensione "Juris."—*To be incorporated.*
Id. 134	27th Edward I. stat. 1. chap. 1.	Statute "De Finibus leva-" tis."—*To be incorporated.*
Id. 139	28th Edward I. stat. 2d.	"A statute for persons appealed."—*Not to be incorporated.*
Id. 145	28th Edward I. stat. 3. chap. 16.	"What shall be done with "them that make false re-" turns."—*To be incorporated.*
Id. 149	33d Edward I. stat. 2d.	"Who be conspirators, and "who be champertors." That part only of this statute is in force, which relates to "conspirators," and from that part is to be excepted what relates to "Stewarts and Bailiffs of great Lords."—*To be incorporated.*
Id. 150	33d Edward I. stat. 3.	"The Statute of Champer-" ty." That part only of this Statute is in force, which relates to Conspirators.—*To be incorporated.*
Id. 151	33d Edward I. stat. 4.	"An Ordinance for In-" quests."—*To be incorporated.*
Id. 152	33d Edward I. stat. 6.	"An Ordinance for mea-" suring of land."—*To be incorporated.*

Book and Page.		Year and Reign.	Titles of the Statutes.
1 Ruffhead	153	34th Edward I. stat. 1st.	" The statute de Conjunc- " tim feoffatis." This statute is in force, except those parts which relate to Writs of " Juris utrum" and " Indicavit."—*To be incorporated.*
Id.	174	12th Edward II. stat. 1. chap. 1.	" Tenants in Assize of " Novel Disseisin may make " Attorneys."—*To be incorporated.*
Id.	175	12th Edward II. stat. 1. chap. 4.	" Justices of Nisi Prius, " shall record nonsuits, de- " faults," &c. Only those parts of this statute are in force, which are distinguished by the numbers 1, 2 and 6.—*To be incorporated.*
Id.	175	12th Edward II. stat. 1. chap. 5.	" An Indenture shall be " made between the Sheriff " and Bailiff of liberty of " every return." That part only of this statute is in force, which obliges Sheriffs and other officers, to sign their names to the return of Writs.—*To be incorporated.*
Id.	177	12th Edward II. stat. 2d.	" The statute of Essoins." *Not to be incorporated.*
Id.	178	15th Edward II.	" A statute concerning " Fines." This statute is in force, except that part which relates to the admission of Attorneys." *To be incorporated.*
Id.	201	2d Edward III. chap. 16.	" Nisi Prius may be grant- " ed, as well at the Tenant's " suit as at the Demandant's." *To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 201	2d Edward III. chap. 17.	" A Writ of Deceit shall be " maintainable in case of gar- " nishment, in plea of land." *To be incorporated.*
Id. 202	4th Edward III. chap. 2.	" The authority of Justices " of Assize, Jail Delivery, " and of the Peace." Only those parts of this statute are in force, which are distinguished by the numbers 6 and 7.—*To be incorporated.*
Id. 203	4th Edward III. chap. 7.	" Executors shall have an " action of Trespass, for a " wrong done to their Testa- " tor."—*To be incorporated.*
Id. 210	5th Edward III. chap. 10.	" The punisnment of a ju- " ror that is ambidexter, and " taketh money."—*To be in- corporated.*
Id. 224	14th Edward III. stat. 1. chap. 6.	" A record which is defec- " tive by misprision of a clerk, " shall be amended."—*To be incorporated.*
Id. 229	14th Edward III. stat. 1. chap. 16.	" Before what persons Nisi " Prius may be granted." That part only of this sta- tute is in force which enacts, that " the Justices of Nisi Prius shall have power to give judgment on verdicts of as- size, and upon nonsuits and defaults, and return the same to the court in Bank."—*To be incorporated.*
Id. 230	14th Edward III. stat. 1. chap. 18.	" If the tenant will vouch to " warranty a dead man, the " demandant may aver that " he is dead."—*To be incor- porated.*
Id. 254	25th Edward III. stat. 2.	" Of those that be beyond " sea." Only that part of this sta- tute is in force which is dis-

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 254	25th Edward III. stat. 2.	tinguished by the number *5. To be incorporated.*
Id. 262	25th Edward III. stat. 5. chap. 3.	" No Indictor shall be put " upon the inquest of the par- " ty indicted."—*To be incorporated.*
Id. 263	25th Edward III. stat. 5. chap. 5.	" Executors of executors " shall have the benefit and " charge of the first Testa- " tor."—*To be incorporated.*
Id. 266	25th Edward III. stat. 5. chap. 16.	" The exception of non-te- " nure of parsel, shall not " abate the whole writ."—*To be incorporated.*
Id. 288	28th Edward III. chap. 13.	" The warranty of packing " of wool shall be put out— " An inquest shall be de me- " dietate linguæ, where an " alien is party." That part only of this statute is in force, which gives an Inquest de Medietate Linguæ.—*Not to be incorporated.*
Id. 293	31st Edward III. stat. 1. chap. 11.	" To whom the Ordinary " may commit the administra- " tion of the goods of him that " dieth intestate—The bene- " fit and charge of an admi- " nistrator." This statute is in force, except that part which relates to expending money for the soul of the deceased.—*To be incorporated.*
Id. 299	34th Edward III. chap. 1.	" What sort of persons shall " be Justices of Peace, and " what authority they shall " have." Those parts only of this statute are in force which are distinguished by the numbers 2, 3, 4, 5, 6 and 10.—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 301	34th Edward III. chap. 8.	"The penalty of a juror "taking reward to give his "verdict."—*To be incorporated.*
Id. 303	34th Edward III. chap. 16.	"Non-claim of fines shall "be hereafter no bar."—*To be incorporated.*
Id. 320	38th Edward III. stat. 1. chap. 12.	"The punishment of a Ju- "ror taking reward to give "verdict, and of Embrace- "ors."—*To be incorporated.*
Id. 332	50th Edward III. chap. 6.	"Fraudulent assurances of "land or goods, to deceive "creditors, shall be void."—*To be incorporated.*
Id. 336	1st Richard II. chap. 9.	"A Feoffment of Lands or "Gift of Goods for Mainte- "nance, shall be void. An as- "size is maintainable against "the pernor of the profits of "land." This statute is in force, except such parts as are altered by the statutes of 4th of Henry 4th, chap. 7.—11th of Henry 6th, chap. 3.—4th of Henry 7th, chap. 24—and 27th of Henry 8th, chap. 10.—*To be incorporated.*
Id. 337	1st of Richard II. chap. 12.	"A prisoner by judgment "shall not be let at large— "Confession of a debt to the "king to delay another's exe- "cution." This statute is in force, except such parts as relate to confessions of debts to the king.—*To be incorporated.*
Id. 359	6th of Richard II. stat. 1. chap. 3.	"In which courts writs of "Nuisance called Vicontiels, "shall be pursued." So much of this statute is in force, as gives the Plaintiff

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 359	6th of Richard II. stat. 1. chap. 3.	an election to have a writ of Nuisance, in nature of an assize.—*To be incorporated.*
Id. 371	8th of Richard II. chap. 4.	"The penalty if a Judge "or Clerk, make a false entry, "rase a Roll, or change a Verdict."—*To be incorporated.*
Id. 372	9th of Richard II. chap. 3.	"A writ of error, or attaint, "maintainable by him in Reversion." So much only of this statute is in force, as gives a writ of error to him in reversion.—*To be incorporated.*
Id. 390	13th Richard II. stat. 1. chap. 17.	"Where he in the reversion "may be received, in a suit "commenced against the particular tenant."
Id. 400	15th Richard II. chap. 2.	"The duty of Justices of "Peace when any forcible "entry is made into lands." So much only of this statute is in force, as relates to forcible entry and detainer, or either of them.—*To be incorporated.*
Id. 437	2d Henry IV. chap. 7.	"In what case the Plaintiff "shall not be nonsuit, if the "verdict pass against him."—*To be incorporated.*
Id. 446	4th Henry IV. chap. 7.	"The Disseisee shall have "an assize against the Disseisor taking the profits."—*To be incorporated.*
Id. 460	5th Henry IV. chap. 14.	"Enrolling of Writs in the "Common Pleas, whereupon "Fines be levied." That part only of this statute is in force which directs, that all the Writs of covenant, and all other Writs whereupon Fines shall be levied, with

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 460	5th Henry IV. chap. 14.	the Writs of dedimus potestatem, if any, with all knowledges and notes of the same, shall be enrolled in a roll, to be of record for ever.—*To be incorporated.*
Id. 483	1st Henry V. chap. 5.	"In which original writs "additions of the Defendant's "name shall be put." So much of this statute is in force as requires an addition of the Defendant's estate, or degree, or mystery, and of the county in which the Defendant is, or in which he is conversant.—*To be incorporated.*
Id. 13	9th Henry V. chap. 4.	"The Justices may amend "defaults in Records or Pro- "cess after judgment given." *To be incorporated.*
Id. 534	4th Henry VI. chap. 3.	"Justices in certain cases "may amend their records "according to former sta- "tutes."—*To be incorporated.*
Id. 545	8th Henry VI. chap. 9.	"The duty of Justices of "Peace, where land is enter- "ed upon or detained with "force."—*To be incorporated.*
Id. 550	8th Henry VI. chap. 12.	"No Judgment or Record "shall be reversed, for any "Writ, Process, &c. rased. "What defects in records "may be amended by the "Judges, and what not." Only the 1st and 2d sections of this statute are in force.—*To be incorporated.*
Id. 553	8th Henry VI. chap. 15.	"The Justices may in cer- "tain cases amend defaults in "Record."—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
1 Ruffhead 557	8th Henry VI. chap. 16.	"An Inquest shall be de "medietate linguæ, where an "alien is party."—*Not to be incorporated.*
Id. 569	11th Henry VI. chap. 2.	"The penalty where a She- "riff is named a Disseisor in "an assize."—*To be incorporated.*
Id. 569	11th Henry VI. chap. 3.	"An Assize, &c. maintain- "able against the pernor of "the profits."—*To be incorporated.*
Id. 571	11th Henry VI. chap. 5.	"The remedy where a te- "nant granteth over his estate, "taketh the profits, and com- "mitteth waste."—*To be incorporated.*
2 Ruffhead 3	1st Richard III. chap. 7.	"Who shall be bound by a "fine levied before the Jus- "tices of the Common Pleas, "and Proclamations made "thereon." This statute is in force, except such parts as are altered by the statute of the 31st of Elizabeth, chap. 2d.—*To be incorporated.*
Id. 68	3d Henry VII. chap. 1.	"The authority of the "Court of Star-chamber, "where one Inquest shall "inquire of the concealment "of another. A coroner's "duty, after a murder com- "mitted. A Justice of Peace "shall certify his recogni- "zances, &c." Only those parts of this statute are in force, which are distinguished by the numbers from 6 to 19, both inclusive, and by the number 26.—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
2 Ruffhead 69	3d Henry VII. chap. 3.	"Justices of Peace may let "prisoners to bail. The She- "riff shall certify the names "of all his prisoners at the "Jail Delivery." Only that part of this statute is in force which is distinguished by the number 5. *To be incorporated.*
Id. 70	3d Henry VII. chap. 10.	"All Deeds of Gift made "to defraud Creditors, shall "be void."—*To be incorporated.*
Id. 72	3d Henry VII. chap. 10.	"Costs, &c. awarded to the "plaintiff, where the Defend- "ant sueth a Writ of Error." *To be incorporated.*
Id. 78	3d Henry VII. chap. 20.	"Actions popular, prose- "cuted by collusion, shall be "no bar to those which be pur- "sued with good faith.—*To be incorporated.*
Id. 79	4th Henry VII. chap. 24.	"How often a Fine levied "in the Common Pleas shall "be read and proclaimed, and "who then shall be bound "thereby."—*To be incorporated.*
Id. 85	11th Henry VII. chap. 12.	"A mean to help and speed "poor persons in their suits." *To be incorporated.*
Id. 89	11th Henry VII. chap. 20.	"Certain alienations made "by the wife, of the lands of "her deceased husband, shall "be void."—*To be incorporated.*
Id. 105	19th Henry VII. chap. 20.	"Writs of Error."—*To be incorporated.*
Id. 120	5th Henry VIII. chap. 6.	"An act concerning Sur- "geons, to be discharged of "Quests and other things." So much only of this sta-

Book and Page.	Year and Reign.	Titles of the Statutes.
2 Ruffhead 120	5th Henry VIII. chap. 6.	tute is in force, as discharges Surgeons from service on juries.—*To be incorporated.*
Id. 126	7th Henry VIII. chap. 4.	"An act concerning "Avowries for Rents and "Services." This statute is in force, except those parts that relate to Writs of quare impedit, and Advowsons.—*To be incorporated.*
Id. 137	21st Henry VIII. chap. 3.	"Plaintiffs in assize may "abridge their plaints."—*To be incorporated.*
Id. 138	21st Henry VIII. chap. 5.	"What Fees ought to be "taken for Probate of Testa- "ments." That part only of this statute is in force, which relates to the persons to whom administration is to be granted.—*To be incorporated.*
Id. 141	21st Henry VIII. chap. 7.	"Servants embezzling their "master's goods, to the value "of forty shillings, or about, "shall be punished as felons." This statute after having been repealed, was revived by the statute of 5th Eliz. chap. 10.—*To be incorporated.*
Id. 147	21st Henry VIII. chap. 15.	"Fermors shall enjoy their "leases against recoveries by "feigned titles."—*To be incorporated.*
Id. 173	23d Henry VIII. chap. 15.	"An act that the plaintiff "being nonsuited, shall yield "damages to the defendant, "in actions personal, by the "direction of the Justices." —*To be incorporated.*
Id. 176	24th Hen. VIII. chap. 8.	"An act where defendant "shall not recover any costs." —*Not to be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
2 Ruffhead 226	27th Hen. VIII. chap. 10.	" An act converting Uses " and Wills." Only the 1, 2, 3, 4, 5, 6, 7, 9, and 10th sections of this statute are in force.—*To be incorporated.*
Id. 261	31st Henry VIII. chap. 1.	" For joint tenants and te- " nants in common."—*To be incorporated.*
Id. 277	32d Henry VIII. chap. 5.	" For the continuation of " debts upon execution."—*To be incorporated.*
Id. 291	32d Henry VIII. chap. 28.	" Lessees to enjoy the farm " against tenants in tail." This statute is in force, except the 4, 5, and 8th sections. —*To be incorporated.*
Id. 293	32d Henry VIII. chap. 30.	" Mispleadings—Jeofails." This statute is in force, except the 2d and 3d sections. *To be incorporated.*
Id. 294	32d Henry VIII. chap. 32.	" Joint tenants for term of " life or years."—*To be incorporated.*
Id. 294	32d Henry VIII. chap. 33.	" An act that wrongful " Disseisin is no Descent in " law."—*To be incorporated.*
Id. 294	32d Henry VIII. chap. 34.	" Concerning grantees of " Reversions to take advan- " tage of the conditions to be " performed by lessees." This statute is in force, except such parts as relate to the king of England and his grantees.—*To be incorporated.*
Id. 296	32d Henry VIII. chap. 36.	" For the exposition of " Fines." This statute is in force, except the 3d and 4th sections. *To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
2 Ruffhead 297	32d Henry VIII. chap. 37.	"For recovery of arrear-"ages of Rents, by executors "of tenant in fee simple." This statute is in force, except the 2d section.—*To be incorporated.*
Id. 375	37th Hen. VIII. chap. 8.	"The act, that any indict-"ment lacking these words, "vi et armis, shall be good." This act is in force, except the 2d section.—*To be incorporated.*
Id. 422	2d & 3d. Ed. VI. chap. 24.	"An act for trial of mur-"ders and felonies committed "in several counties."—*To be incorporated.*
Id. 461	1st Mary, session 2d. chap. 7.	"An act touching procla-"mations upon Fines."—*To be incorporated.*
Id. 484	1st & 2d Philip and Mary, chap. 12.	"An act for the impound-"ing of Distresses." Only the first section of this statute is in force.—*To be incorporated.*
Id. 484	1st & 2d Philip and Mary, chap. 13.	"An act concerning bail-"ment of persons." The 2d, 3d, 4th and 5th sections only are in force.—*To be incorporated.*
Id. 493	2d & 3d Philip and Mary, chap. 10.	"An act to take the exa-"mination of prisoners sus-"pected of any Manslaughter "or Felony."—*To be incorporated.*
Id. 549	5th Elizabeth, chap. 9.	"An act for punishment of "such as shall procure or "commit any wilful perjury." This statute is in force, except the 10th, 11th, 12th, and 13th sections, which are inapplicable to this Commonwealth, and except the punishment by imprisonment, and

Book and Page.	Year and Reign.	Titles of the Statutes.
2Ruffhead 549	5th Elizabeth, chap. 9.	paying of money, which is altered by our act of assembly for reforming the penal laws.—*To be incorporated.*
Id. 571	8th Elizabeth, chap. 2.	"An act for avoiding of "wrongful vexation, touching "the Writ of Latitat." Only the 1st, 2d, 4th and 5th sections of this statute are in force.—*To be incorporated.*
Id. 588	13th Elizabeth, chap. 5.	"An act against fradulent "deeds, alienations, &c."—*To be incorporated.*
Id. 607	14th Elizabeth, chap. 8.	"An act for the avoiding "of Recoveries suffered by "collusion by tenants for term "of life, and such others."—*To be incorporated.*
Id. 621	18th Elizabeth, chap. 14.	"An act for Reformation "of Jeofails." This statute is in force, except the 3d section.—*To be incorporated.*
Id. 626	23d Elizabeth, chap. 3.	"An act for the Reforma- "tion of Errors in Fines and "Recoveries." This statute is in force, except the 6th, 7th, 8th, 9th and 10th sections.—*To be incorporated.*
Id. 636	27th Elizabeth, chap. 4.	"An act against covinous "and fraudulent conveyan- "ces." This statute is in force, except the 7th, 8th, 9th, 10th, 11th and 12th sections.—*To be incorporated.*
Id. 638	27th Elizabeth, chap. 5.	"An act for furtherance of "Justice in case of Demurrer "and Pleadings."—*To be incorporated.*
Id. 659	31st Elizabeth, chap. 2.	"An act for abridging of "proclamations upon Fines to

Book and Page.	Year and Reign.	Titles of the Statutes.
2 Ruffhead 659	31st Elizabeth, chap. 2.	"be levied at the common "law."—*To be incorporated.*
Id. 668	31st Elizabeth, chap. 11.	"An act of Explanation or "Declaration of the statute of "Octavo Regis Henrici VI. "concerning forcible entries, "the indictments thereupon "found."—*To be incorporated.*
Id 712	43d Elizabeth, chap. 8.	"An act against fraudulent "administration of intestate's "goods."—*To be incorporated.*
3 Ruffhead 52	3d James I. chap. 8.	"An act to avoid unneces- "sary delays of Execution." —*To be incorporated.*
Id. 68	4th James I. chap. 3.	"An act to give costs to the "defendant, upon a nonsuit "of the plaintiff or verdict "against them."—*To be incorporated.*
Id. 99	21st James I. chap. 13.	"An act for the further re- "formation of Jeofails."— *To be incorporated.*
Id. 100	21st James I. chap. 15.	"An act to enable Judges "and Justices of the Peace to "give restitution of Posses- "sion in certain cases."—*To be incorporated.*
Id. 111	21st James I. chap. 24.	"An act for the relief of "creditors against such per- "sons as die in execution."— *To be incorporated.*
Id. 192	12th Charles II. chap. 24.	"An act for taking away "the court of Wards and Li- "veries, and Tenures by Ca- "pite, and by Knight's Service "and Purveyance, and for "settling a revenue on his "Majesty in lieu thereof."— Only the 8th and 9th sections of this statute are in force.—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
3 Ruffhead 215	12th Charles II. stat. 2. chap. 2.	"An act for the prevention "of vexations and oppres- "sions by arrests, and of de- "lays in suits of law." This statute is in force, except certain parts which have a local object, and are therefore inapplicable to this Commonwealth, and certain other parts, which are altered by our acts of the assembly, or the practice of our courts.—*To be incorporated.*
Id. 293	16th and 17th Charles II. chap. 8.	"An act to prevent arrests "of judgment, and supersed- "ing executions." This statute is in force, subject to the same exceptions as were mentioned with relation to the statute of 12th Charles II. stat. 2d, chap. 2.—*To be incorporated.*
Id. 299	17th Charles II. chap. 8.	"An act for avoiding un- "necessary suits and delays." —*To be incorporated.*
Id. 313	19th Charles II. chap. 6.	"An act for redress of in- "conveniences by want of "proof of the deceases of per- "sons beyond the seas, or ab- "senting themselves, upon "whose lives estates do de- "pend."—*To be incorporated.*
Id. 357	22d and 23d Charles II. chap. 9.	"An act for laying impo- "sitions on proceedings at "law." All that is unexpired of this statute, that is to say the 136th section "for prevention of trivial and vexatious suits in law," is in force.—*To be incorporated.*
Id. 394	30th Charles II. chap. 7.	"An act to enable creditors "to recover their debts of the

Book and Page.	Year and Reign.	Titles of the Statutes.
3 Ruffhead 394	30th Charles II. chap. 7.	" executors and administra- " tors of executors in their " own wrong."—*To be incorporated.*
Id. 527	4th and 5th William & Mary, chap. 21.	" An act for delivering de- " clarations to prisoners."—*To be incorporated.*
Id. 642	8th and 9th William III. chap. 11.	"An act for the better pre- " venting frivolous and vexa- " tious suits."—*To be incorporated.*
Id. 697	9th and 10th William III. chap. 15.	" An act for determining " differences by arbitration." —*To be incorporated.*
4 Ruffhead 14	10th and 11th William III. chap. 16.	" An act to enable posthu- " mous children to take estates " as if born in their father's " life time."—*To be incorporated.*
Id. 43	11th and 12th William III. chap. 6.	" An act to enable his Ma- " jesty's natural born subjects, " to inherit the estates of their " ancestors either lineal or " collateral, notwithstanding " their father or mother were " aliens."—*To be incorporated.*
Id. 180	3d & 4th Anne, chap. 9.	" An act for giving like " remedy upon promissory " notes, as is now used upon " bills of exchange, and for " the better payment of inland " bills of exchange." The 1st, 3d, 4th and 8th sections of this statutes are in force.—*To be incorporated.*
Id. 205	4th Anne, chap. 16.	"An act for the amendment " of the law, and the better " advancement of justice." The first 13 sections, and the 20th and 27th sections of this statute are in force.—*To be incorporated.*

Book and Page.	Year and Reign.	Titles of the Statutes.
5Ruffhead 201	5th George I.	"An act for the amendment " of writs of error, and for the " preventing the arresting or " reversing of judgments af- " ter verdict."—*To be incorporated.*
6Ruffhead 167	7th George II. chap. 20.	" An act for the more easy " redemption and foreclosure " of mortgages." The 1st and 2d sections of this statute are in force.—*To be incorporated.*
Id. 296	11th George II. chap. 19.	"An act for the more effec- " tual securing the payment " of rents, and preventing " frauds by tenants." The 14th and 15th sections of this statute are in force.—*To be incorporated.*

There are several statutes, called statutes of *Mortmain*, one of which (" the statute de Religiosis") was passed in the 7th year of Edward I. statute the 2d; another in the 13th year of Edward I. chap. 32; another in the 15th year of Richard II. chap. 5; and another in the 23d year of Henry VIII. chap. 10. These statutes are in part inapplicable to this country, and in part applicable, and in force. They are so far in force, that all consequences, either by deed or will, of lands, tenements or hereditaments, made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter or act of assembly. So also are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a *superstitious* nature, and not calculated to promote objects of charity or utility.—*To be incorporated.*

WM. TILGHMAN,
J. YEATES,
THOMAS SMITH,
H. H. BRACKENRIDGE.

December 14, 1808.

District Court of the United States.

AT NORFOLK, DECEMBER, 1808.

The United States *v.* Hipkin and others. *In debt.*

THIS was an action of debt brought to recover the sum of 1200 dollars, the penalty of the bond given by the defendants for the enrolment of the schooner *Caroline*.

The declaration set out the bond and the conditions, among which was the following, "and if the said schooner *Caroline* shall not proceed on a voyage to any foreign port or place without being duly licensed according to law for carrying on the cod or whale fishery, and without obtaining a permit to touch and trade at a foreign port or place during such voyage, or without previously surrendering the said certificate of enrolment to the collector of the district from which such foreign voyage shall be proposed to be made then," &c. This condition it was averred had been broken in this, "that the said schooner *Caroline* on the ——— day of ——— 1808, proceeded on a foreign voyage, to wit: on a voyage to *Antigua*, which was a foreign place, without being duly licensed according to law for carrying on the cod or whale fishery, and without obtaining a permit to touch and trade at a foreign port or place during such voyage, and without previously surrendering the said certificate of enrolment to the collector of the district from which such foreign voyage was proposed to be made, viz. to the collector of the port of *Norfolk* and *Portsmouth;*" by reason whereof the said bond was forfeited and its penalty demandable.

To this declaration there was a general demurrer, in which the *United States* having joined, the cause came on to be argued by *Hay*, district attorney for the plaintiffs, and by *Taylor* and *Tazewell* for the defendants.

For the defendants it was contended, that the condition above stated for a breach of which alone this action was

brought, was 1st, a condition not authorized by the statute; 2d, a condition contrary to the express provisions of the law which permitted and required the bond; 3d, a condition hostile to the genius and spirit of all our laws upon the subject of navigation and commerce. And if so, that the condition was void, and no action could be maintained for a breach of it.

In support of these propositions it was said,

1st, That the only law, which permitted or required any bond to be given for the enrolment of a vessel, was the act of congress passed on the 18th of *February* 1793, entitled, "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," 2 *vol. Laws United States* 168. That this statute contained in itself no direction as to the form or contents of a bond to be given for the enrolment of a vessel, and indeed contained no direct declaration that any bond should be given at all. The second section of that law declares, that " in order for the enrolment of any ship or vessel, she shall possess the same qualifications, and the same requisites in all respects shall be complied with as are made necessary for registering ships or vessels, by the act entitled, 'An act concerning the registering and recording of ships or vessels,' and the same duties and authorities are hereby given and imposed on all officers respectively, in relation to such enrolments, and the same proceedings shall be had in similar cases touching such enrolments."

This law having directed the same requisites in all respects to be complied with, and the same proceedings to be had in the case of an enrolment, as had been required in the case of a register by the act therein referred to, although the act concerning the enrolling of vessels contained in itself no specific direction requiring a bond to be taken, or prescribing the form of such bond, yet as the act concerning the registering of vessels did make the execution of a bond a requisite to be complied with and proceeding to be had as in the case of a register; a similar requisite and proceeding was exacted in the case of an enrolment. Expunge this statute from our code and *no bond* can be required of an enrolled vessel. Admit this statute

and the *only bond* which it requires is a similar bond to that required in the case of a register.

The "act concerning the registering and recording ships or vessels," which is referred to as above, in its seventh section declares by whom, to whom, in what penalty, and with what condition a bond for obtaining a register shall be executed. See *2d vol. Laws United States* 137.* Compare this bond with that section, and you will discover their precise concordance, until you come to the condition, which is the foundation of the present action, and which is no where to be found in the law. Nay, it would be strange indeed, if we expected to find any such condition in a bond of registry, remembering, as we must do, that the sole inducement for taking a register, is to qualify the vessel which receives it, to proceed on a foreign voyage. This condition, therefore, is not authorized by law.

4. To support the third position, viz. that such a condition was hostile to the genius and spirit of all our laws upon the subject of navigation and commerce, the defendant's council entered into a critical and historical examination of all these laws. The *characters* of the various vessels engaged in the trade of the *United States* were stated, and they were divided

* By the 8th section of the act of congress, concerning the enrolling vessels, it is provided "that if any ship or vessel enrolled or licensed as aforesaid, shall proceed on a foreign voyage without first giving up her enrolment and license to the collector of the district, comprehending the port from which she is about to proceed on such foreign voyage, and being duly registered by such collector, every such ship or vessel, together with her tackle, apparel and furniture, and the goods, wares and merchandise so imported therein, shall be liable to seizure and forfeiture." See *2d vol. Acts of the United States, p.* 174. By this bond a penalty of 1200 dollars is imposed by the collector for the performance of the very same act. To support this action, then it must be contended, either that the collector, by his penalty, has repealed that imposed by the law, or that the offending individual is subject to two penalties for the same act, one imposed by the collector, the other by the law. But as both these propositions would bestow high legislative authority on a very humble ministerial officer of the executive, it is believed that neither can be contended for, but that it must be admitted that this condition is *contrary* to the express provisions of the statute, which imposes another and a different punishment for this act.

into the following classes, to wit: foreign, recorded, registered, enrolled, and licensed vessels. The *privileges* and *duties* enjoyed by, and imposed upon each of these classes of vessels, were also detailed, and supported by a reference to the various statutes imposing duties on tonage and goods, and regulating the collection of duties. It was then argued, that congress, having distinguished these vessels as above, and having endowed them with *different* privileges, and imposed upon them *different* duties, it became necessary to establish some standard whereby the one class might always be distinguished from the other by those who were authorized to exact the performance of these duties, or permitted to grant these privileges. Hence certificates of record, registry, and enrolment were introduced as constituting the sole evidence, and fixing the standard whereby the different characters of vessels were to be ascertained. But as these documents might be missed, and others, not entitled to the privileges which followed their possession, might enjoy such privileges by obtaining the documents themselves; to guard against such frauds, bonds were required to be executed by those who first obtained such documents: The sole object of these bonds being to preserve *American* documents in *American* hands, the condition of such bonds attained this object, and none other. A reference to the seventh section of the act, before stated, *2d vol. Laws United States p.* 137. would establish this position. There it would be found, that the only conditions annexed to a bond of register referred to the proper use of her documents, and similar proceedings were directed to be had in the case of enrolled vessels. These being the only kinds of *American* vessels which were capable of engaging in foreign trade, and therefore of misusing such documents, the bonds for these referred to this object only. As to licensed vessels, they being under twenty tons, and incapable of engaging in foreign trade, no misuse of their documents could be had to the detriment of the revenue; and therefore, no such bonds were exacted from them as were requested from the others. Frauds against the public revenue by smuggling, being the only mischief which such vessels were

capable of committing, the condition of the execution by those concerned in a licensed vessel referred to this object, and to none other. Hence it was concluded, that the insertion of a condition, as was found in the present bond, was hostile to the spirit of all our laws upon the subject of navigation and commerce.

Having established these points, the counsel for the defendants observed, that no argument would be used to prove that such a condition not authorized by the expressed will of the legislature and hostile to the spirit of all our laws upon this subject, was void in itself. This point would be taken as granted, until it should be denied by the counsel for the *United States*. If the condition was void, no action could be maintained for a breach of a void condition, and therefore as the only breach assigned for the forfeiture of the bond in question was a breach of this condition, the present action could not be maintained, and the demurrer must be established.

The defendants' counsel concluded the argument by showing the absurd effects and tyrannical consequences which would result from permitting public officers to insert in bonds which they have authority to exact from individuals any condition which they thought proper, and which the law neither required nor permitted.

The argument on the part of the defendants being concluded, *Hay*, district attorney, said, that he should not pretend to deny the truth of the concluding argument which had been urged by the defendants, but would admit that a condition in a bond taken by a public officer, which was not authorized by the law which required the bond, was void, and that no action could be maintained for the breach of such a condition. Whether the condition in the present bond was of this description or not he would not pretend to say at present. If the laws referred to by the defendants' counsel were the only laws upon the subject, the argument which had been urged was unanswerable. But the bond in question had been taken in pursuance of instructions received by all the collectors in the *United States*, from the treasury department in the year 1793, shortly after the

enaction of the laws which had been referred to by the counsel for the defendants. Supposing that the officer of that department was perfectly acquainted with the law, under which he was acting when these instructions were given, and indeed being convinced of this, not only from the general character of the department itself, but from an universal acquiescence in the form of the bond by every individual who had executed such a bond for 15 years past, he had not deemed it necessary to examine the form of the bond and to compare it with the law which required it upon the present occasion.

He hoped the court would allow him some time not only to examine the various acts of congress upon this subject himself, but to consult with the officers of the customs, whose duty it was more particularly to attend to such matters, in order to inform himself if there were any other provision in the laws which had been cited, or any other statutes which applied to this case. The judge granted this application; and the cause was continued for several days.

On *Monday* last, Mr. *Hay* stated to the court, that he had not only made every examination into the subject which he could, but had also applied to the officers of the customs for their aid in this research. It had been in vain, however; for no other laws could be found applicable to the case, but those to which the defendants' counsel had referred.

The positions for which they had contended under those laws he could not deny, and therefore with the consent of the defendants' counsel he should dismiss the cause. This was done accordingly; and at the same time several other causes which had been instituted on similar bonds, were also dismissed.

Commonwealth of Pennsylvania.

On a Habeas Corpus to the Keeper of the Prison of Philadelphia, to produce the Body of *Hippolyte Dumas*, &c.

IT appears that *Hippolyte Dumas* was an ensign on board the *French* ship *Alexander*, which was captured by the *British* off *St. Domingo* and carried to *Jamaica*. He was there discharged on his parol, and came to the *United States*, where he applied to the consul general of *France* for support as a *French* officer, and for a passage to *France*. The consul assisted him with money and promised him a passage. Some time after, the captain and crew of the *French* frigate *La Valeureuse*, which had come to the port of *Philadelphia* in distress, and been condemned as unfit for the sea, were about to be sent to *France*, in the *American* ship *Washington*, commanded by the *American* captain *George Morse*, chartered by the consul general for that purpose. The name of *Dumas* was enrolled among the passengers. The ship sailed to *New Castle*, in the state of *Delaware*, in the prosecution of her voyage, and stopt there. *Dumas* went to *New Castle* by land, and having arrived there, did not go on board the *Washington* but went to *Baltimore*, from whence he returned to *Philadelphia*. The consul general claimed him as a deserter from the navy of his imperial and royal majesty the emperor of *France* and king of *Italy*, and upon an affidavit made by him, alderman *Shoemaker* committed *Dumas* to prison, there to be kept till an opportunity should offer of sending him to *France*. Since that, the consul general has brought a civil action against *Dumas* for the recovery of the money advanced to him. We thank the learned counsel, who by their researches and arguments have thrown light on this important subject.

It is much to be wished that cases of this nature were regulated by a law of the *United States*. There certainly is great

convenience in the delivering up of deserters, who *in our ports* leave the ships of those nations, who on their parts are willing to give up deserters from our vessels in similar cases; and great inconvenience may result from its not being done. But without any law of the *United States* or of this state to warrant it, we look upon the interference of a state judge in the delivering up of a foreign deserter, as a matter which requires very serious consideration. When the question fairly occurs, it shall receive all the consideration it merits: at present we mean not to touch it, because the particular circumstances of *Dumas's* case, put him in a different situation from that of an officer who, being on board a foreign ship of war which has come to our ports, deserts from her. Necessity may in that case authorize strong measures, because if the ship is deserted by a considerable number of her crew, she cannot be navigated. *Dumas* came to the *United States* unconnected with any *French* vessel; he required a passage home from the consul of his nation; he was to have had that passage in an *American* vessel; and the only circumstance which places him at all in the light of a deserter, is that of his name being enrolled among that body of men, who, although sailing in an *American* vessel, were by the military law of *France* subject to the command of the captain of the *Valeureuse*, he being the superior officer. The consul general having brought a suit against him for the recovery of the money advanced, seems to countenance the idea of his not being a deserter; for if he is to be delivered up as such, he ought not at the same time to be responsible in a civil action. Under these circumstances, we are of opinion that even supposing the laws of nations required of the *United States*, to give up generally those seamen who desert from foreign ships of war within our harbours, and that alderman *Shoemaker* was authorized to carry this law into effect (points concerning which we give no opinion) still this case is of so special a nature as to form an exception to the general rule.

We therefore order that *Dumas* be discharged from confinement under the warrant of alderman *Shoemaker*.

[Delivered by Chief Justice *Tilghman* and Judge *Smith*, *Monday*, 20th *July*, 1807.]

Pennsylvania—Court of Common Pleas.

ERIE COUNTY, 1807.

The President, Managers and Company of the Erie and Waterford Turnpike Road *v.* John Cochran, Esq.

TURNPIKE COMPANY. TRESPASS. The Legislature of Pennsylvania may prescribe the manner in which land may be taken by an incorporated Turnpike Company, for the purpose of making a road. If the Company offer to make compensation to the owner of the land, agreeably to the law, which he refuses, and obstructs that part of the road which passes through his land, the Company may maintain trespass against him.

THIS was an action of trespass for entering on and obstructing the passage of the route or track laid out and opened by the company, for the turnpike road, in *Millcreek* township, in *Erie* county, by building two fences across the road, and falling several trees on and across the same; the defendant plead not guilty, with leave to give the special matter in evidence.

It appeared in evidence, that the turnpike company having surveyed and marked out the track or route of the road from *Erie* to *Waterford*, had contracted for the opening and completing that part of the road, which passes through the defendant's land, part whereof passes through one of the defendant's fields about the distance of eighty perches; that the contractor was bound, by articles of agreement, to make a good and substantial fence on each side of the road, where it passed through the said field; which appeared to have been done, in the course of last fall, excepting (as some witnesses testify) that between some of the under rails and the ground, too large a vacant space was left; and in a few instances, some rails near the under rail were somewhat crooked; and in one instance, a rail had been split and left in the fence, the one part lapping over the other, and supported in the centre by a small block or chunk; that the

fence was otherwise well made, being eight rails high; that said fence was not begun till after harvest; that in hauling the rails, until the fence was put up, the gap through which they entered the field to haul the rails and to work at the road, was regularly closed every night, with the exception of one night, which appeared to have happened by accident; that no notice was ever given by the defendant to the plaintiffs of any alleged insufficiency of the fence. The defendant had, in the course of the summer, proposed to sell to the plaintiffs, that part of his land necessary to be occupied for the road, but had demanded a price which they deemed extravagant, viz. 20 dollars per acre for the whole, as well wood land as cleared land, except a small part that had been previously occupied by a county road. The plaintiffs proposed to him, to proceed in the manner pointed out by the 10th* section of the law, by petition to the court, who would appoint six *disinterested* persons to view and ascertain the sum which he ought to receive, and which they would immediately pay. This he refused; saying, no person should fix the value of his property, and until the company paid him what he *pleased* to ask, they should not make the road, and he would shut it as fast as they should attempt to open it.† It appeared, that the defendant was the only person from *Erie* to *Waterford* that asked any compensation for their land through which the turnpike road passed; and that he was greatly benefited by the road, having a grist and saw mill almost adjoining the road.

* [By the act of the 6th *April* 1802. § xiv. it is provided, that in cases where a public road is carried through any land to the injury of the owner, he may, within one year, but not afterwards, make a representation by petition to the court of quarter sessions. The court then appoints six disinterested persons to ascertain the damage, and upon their report being approved by the court, the amount ascertained is paid by the treasurer of the county.

The private act above referred to is not to be procured in *Baltimore*, but it is presumed to be conformable to this public act.]

† In *November* last the trespass charged was committed; which it was estimated would cost two dollars and fifty cents to remove.

William Wallace and *Alexander W. Foster*, esqrs. were concerned as counsel for the plaintiffs; and *Patrick Farrelly*, esq. counsel for the defendant.

Mr. *Wallace* opened the cause by giving a brief detail of the facts, which he expected would be given in evidence, and of the principles of law which would arise in the cause.

Mr. *Farrelly*, after having opened the cause on the part of the defendant, and concluded the testimony, contended,

1st, That there is a controlling power in courts of justice, to set aside any law contrary to the constitution.

2d, That by the constitution no property can be taken, but for public use; that this was for private use; as some particular case might occur of an individual too poor to pay the toll, and therefore he would not have a right to pass. This exception would therefore take away from the generality the public right, and would prove it to be for private use only, as any thing for public use must be for the use of the public.

3d, Until compensation was made by the company, they had no right to enter; they could acquire no right but by purchase; and he had the same right to fix the value on his own property, as if contracting with an individual.

4th, The act is silent as to damages for land used for the route of the turnpike; it only applies to the case of damages for taking materials. This case must rest upon the constitution. No remedy for judge *Cochran*, if they could not agree on the price, but for him to bring a suit in court, for the value of his land.

Mr. *Foster* began by observing the great evils that arise to the public, when men, who from wealth, talents or official situations, have gained an influence in society, and who, instead of directing that influence to beneficial purposes, adopt erroneous principles and practices. That the injuries such men do, go beyond themselves; for their example is too apt to influence the conduct of others, who have not the same means of information; or who rely implicitly on their judgment; that an opposition had been raised by one or two individuals, to the payment of their shares, which had extended to others; and,

unfortunately, those persons suffered who had been persuaded to refuse the payment of their shares; while those who had urged them on to opposition, had settled their own causes, and were afraid to bring them to trial. In this case, it was more fortunate than might have been expected, and was much to the honour of those owning lands on the turnpike, that the example of the defendant had produced no opposition by others.

As to the first point made by the defendant's counsel, Mr. *Foster* said, he was happy to find the gentleman adopt sentiments so correct. He admitted the constitution to be the supreme law of the land, and believed it to be paramount to all acts of the legislature, otherwise it would be a dead letter. He believed it to be "the palladium of our liberties," and he was willing to meet him on constitutional grounds, and if the constitution should prove that the defendant might hold his property from being taken and applied to a great public undertaking, honourable to those who planned and supported it, and on which the future prosperity of this country depends, until he was paid whatever price he might demand for it; then he would agree with a meeting, of which the defendant had once been a member, that the constitution was not as perfect as it might be. Here Mr. *Foster* was interrupted by Mr. *Farrelly*, who said, he had only used the argument as the opinion of his client. Mr. *Foster* replied, he was happy to find so correct an opinion had gone beyond the counsel to the defendant.

Secondly, Mr. *Foster* complimented Mr. *Farrelly* on the greatness of the discovery, that "*whatever was for the public use, must be for the use of the public.*" That the case put of a person unable to pay, not being able to travel the road, made no more difference, than if he had been prevented by sickness or intoxication; none of these disabilities made the road a private one. If the road was private and for the exclusive use of the company, they would have a right to prevent any person whatever from travelling it: whereas, they can prevent no person from travelling, who will comply with the act, and pay a moderate toll, to compensate for the great expense accrued in making the road. That the argument, if correct, would put

it out of the power of the legislature to have an artificial road made, unless individuals would make it without any remuneration for their expenditures.

As to the third point, the constitution fixed the principle, that the property of an individual might be taken for public use; that no mode being pointed out by the constitution, to ascertain the value, it must be ascertained and regulated by the legislature. But the principle contended for, would be to make a man a judge of his own cause, which is against the principles of eternal justice, or to allow him to retain his property, however necessary for the public good; which cannot be so in a state of society, where no man liveth to himself, but is a member of the great family of the state, and must yield up private convenience for the public good; for which, he is to receive a just compensation, but of which he is not to be judge, in his own case.

As to the fourth and last point, the law clearly provides, that that if any person considers himself damaged, by the road going through his land, he may apply to the court, who will appoint six disinterested persons to ascertain the amount which is to be paid by the company. As to the remedy pointed out by the court, it would be nugatory. There is no form of action by which such a suit could be brought. And as the counsel urges that no right could exist in the company until compensation should be made, which in this case could not be done, till a suit at law was determined; this the defendant might not commence for ten years or fifty years; by which means he had it effectually in his power to defeat the road from being ever made, until his avarice should be gratified, or his perverseness removed.

That, therefore, the defandant was clearly a trespasser; that if the jury believed the trespass wilful and malicious, to harass the company in their operations in endeavouring to promote the great essential interests of the country, they ought to find damages not only to compensate the plaintiffs, but also to punish the defendant. That the court would then not only be a court of justice, but a school of morals.

The court in the charge to the jury stated, that the constitution being silent as to the mode in which individuals, whose property was taken for public use, should be compensated, the legislature had the power to prescribe such one as should be just: that the mode directed in this case was an equitable one, and clearly within their powers; and as to the form of suit, that the turnpike company had such a possession of and interest in the road, as enabled them to support an action of trespass against any person who should obstruct it; otherwise the power given them, and the obligation they were under to keep the road for ever in repair, would be nugatory, and could never be carried into effect.

The jury awarded twenty two dollars fifty cents damages, and costs of suit.

Georgia: Liberty County Superior Court.

NOVEMBER TERM, 1808.

Paul Grimball *v.* Francis Ross. *In Equity.*

CHARLTON, Judge. A motion has been made by Mr. *Noel* and Mr. *Berrien* to bring on the trial of this case upon these two material grounds.

1st, Because the act entitled "An act to alleviate the condition of debtors, and afford them a temporary relief," does not prevent the trial of equity cases, our statutes having created a distinction between equity and civil cases; and if this ground should not be sustained, it is still contended that this equity case can be tried.

2d, Because the "Act to alleviate the condition of debtors and to afford them a temporary relief" is unconstitutional.

The counsel for the complainant, as well as Mr. *Harris*, who opposed the motion, have supported their respective arguments with learning and ability; and the ample information elicited from the discussion, has enabled me in the course of

the *few hours* allowed for the daily adjournment of the court, to arrange my ideas, and to give some kind of method to the opinion which I am now about to deliver. I shall take the liberty of reversing the order in which the grounds for the motion have been stated: because, if the act is unconstitutional, it will be perfectly unnecessary to advert to the distinction between an EQUITY and a CIVIL case.

First: Is the act of the general assembly *unconstitutional?*

The power which the *judicial department* claims of deciding on the constitutionality of laws, is a power inseparable from the organization of that department. It is a power which results from the peculiar construction of the federal and state compacts: without it, all the horrors of *legislative omnipotence* would instantly stare us in the face, followed by a prostration of those wise checks a legitimate exercise of that power imposes upon all wicked usurpations on the sacred rights of the people.

In *England* they have no constitution; hence their parliament possesses omnipotent powers. *Englishmen* call MAGNA CHARTA, their bill of RIGHTS, and ACT of SETTLEMENT, component parts of the *British* constitution. But we all know that the people had no agency in any of those measures, consequently they were acts of an omnipotent legislature or of an oligarchy assuming and exercising the sovereign authority.

A constitution stands upon a different basis. It emanates directly from the *will* of the people, in whom from the very nature of things the sovereign power necessarily resides. As soon as the people have given existence to this constitution, it becomes the supreme law of the nation or the state; it is paramount to all other authority; and that mighty fiat, and that fiat only, which gave it life, can announce its destruction.

These are the political tenets which cling to, and are dear to the hearts of all TRUE AMERICANS. They are tenets dear to *Americans*, because who can oppress or can be oppressed, under the benign and energetic influence of a written constitution, which designates and guarantees all the rights of man, and which raises up every arm in defence of them.

From passion, from unprincipled ambition, from the illusions of ignorance, from the ebullitions of political acrimony or misguided zeal, it is very easy to perceive the possibility of an unconstitutional act of the legislature. What then is the remedy? A recourse to the people's vengeance. Must the people be called upon to defend in their aggregate capacity, that compact and those privileges which flowed directly from the source of their volition? If this is the remedy, our boasted republicanism is nothing more than systematical anarchy, and it would therefore be better for us to repose on the thorny protection of an absolute monarch. Is the remedy found in a patient endurance of the evil, until succeeding legislatures think proper to repeal the unconstitutional edict? This would be worse than an appeal to popular insurrection; for it is founded on the preposterous expectation, that the same hand which cruelly and deliberately inflicted the wound, will be benevolently extended to heal it: it is worse than popular insurrection, because it presupposes an acquiescense in an outrage upon constitutional rights longer than ought to be borne by *American citizens*. The remedy can only be found then in the wisdom and independency of the judicial department. *Here*, the passions, the feelings, and the interests which may and frequently do sway deliberative bodies, cannot be found. This department is aided by all the lights which cool and dispassionate investigation can afford, and it is governed by maxims of jurisprudence which, *apertis foribus*, offer a secure asylum to every citizen whose weakness or injuries solicit admission and protection. This department cannot deviate from those fixed principles which, for ages, the approbation of mankind has stamped with the seals of truth and authority. In this respect the judicial is unlike the legislative department, whose functions are regulated by the caprices of an arbitrary discretion. Under thi view of the judicial department, it is surely the best, the safest, and in our republic, can be the only mediator between a citizen and an unconstitutional act of the legislature.

The objection, that the judicial department cannot decide on the constitutionality of an act of the legislature, because the

judges are elected by the legislature, and that therefore the *creature* cannot be greater than the *creator*, is a mode of reasoning abhorred by the constitution. It is true, that the judges are elected by the legislature, but when elected they constitute a department coequal, and coordinate with the legislature. What other inference can be deduced from the distinctiveness established in the constitutional declaration? Article 1. sect. 1. Precedents are not wanting either in the federal or state jurisdictions, to prove that the judicial department possesses and has actually exercised the power of deciding on the constitutionality of legislative acts. I have here no access to books, and therefore will not venture to state from recollection the principles upon which each case was decided. My mind is satisfied with throwing out these general, and perhaps they may be called desultory observations, which convey on this point my opinion as strongly as I can express it. But if the judicial department can declare an act unconstitutional, in what manner ought a power of such magnitude to be exercised? I think it ought only to be exercised where the act is directly in the teeth of the constitutional provision: and I agree with what fell from Mr. *Harris*, that no nice doctrines, no critical exposition of words, no abstract rules of interpretation, such as may fit the elucidation of principles in a legal contest between individuals, can or rather ought to be resorted to in deciding on the constitutional operation of a statute. The violation of a constitutional right ought to be as obvious to the comprehension of every one as an axiomatic truth: as that the parts are equal to the whole.

I shall endeavour to illustrate this: The 1st sect. of the 2d article of the constitution declares, that the "executive shall be vested in the governor." Now, if the legislature was to vest the executive power in a "*standing committee of the house of representatives*," every mind would at once perceive the unconstitutionality of the statute. In such a case as that, therefore, the judicial department would be authorized without hesitation to declare the act unconstitutional. But where it remains *doubtful* whether the legislature have or have not trespassed upon

the constitution, the conflict ought to be avoided, because there is a possibility in such a case of the constitution being on the side of the legislature.

If this act therefore involves principles as evidently unconstitutional as the case I have stated, I shall say so, and at the same time feel perfectly tranquil under the clamour or the consequences which may result from such a decision. If on the other hand, the 4th section of this act, or the parts of it which have been particularly alluded to, can be placed in alliance with the constitution; or if it becomes a matter of difficult solution whether that section is or is not reconcilable with the constitution, I shall then feel much gratification in escaping from a combat with legislative authority. This section of the act declares " that neither of the aforesaid courts shall issue out any civil process or try any *civil case*, except for the trial of the right of property, real and personal," &c. This act expires on the 25th of *December* next. Mr. *Berrien* says, that this section of the act is unconstitutional, because it inhibits a citizen from taking advantage of the trial by jury under the usual and regular administration of justice, and because it interferes with the sittings of the superior court, which are directed by the constitution to be held twice every year in each county.

Mr. *Noel* says, that this section of the act, or the whole of the act is unconstitutional, because it impairs the obligation of contracts.

The first objection may, I think, be answered very laconically. The trial by jury is not taken away by a bare postponement of the trial of cases in which the interposition of a jury may be required. The positive and unqualified deprivation of a right, is surely different from the temporary delay of the enjoyment of that right. A denial of a right, legally speaking, is an unlimited prohibition of its enjoyment. If the right is not annihilated it exists. Now in the case under discussion, there is no express inhibition of the trial by jury, and therefore agreeably to the positions I have before suggested, if the denial of the right of trial by jury is not the clear and explicit

language of the act, the judicial department will not resort to finespun deductions to find out the violation of that, or any other constitutional franchise. As a conclusion to this objection, I am then of opinion, that so far from taking away the right of the trial by jury, this act acknowledges the unimpaired existence of that right, and only affects the trial of the cases for a definite period.

The second objection may have its weight in the opinion of the learned gentleman who urged it, but with me it has none.

The constitution merely declares, that "the superior and inferior courts shall sit in each county twice in every year, at such stated times as the legislature shall appoint." 1*st sect.* 3*d art.* This act does not interfere with the *sittings* of the superior court in each county every year. If the legislature had declared that the superior court should *not* sit at all for the term of one year, or that its sittings should be held only *once* in each county for the term of a year, under such a prohibition the act would be pronounced unconstitutional: but how can the idea of the *business* which is properly cognizable in the superior court, be identified with the sittings of that court? To me there appears as wide a difference between the sitting of the court (which the constitution must mean an opening of the court) as there is between the action of *trover*, and the daily adjourning proclamation of the sheriff. The constitution is silent as to the manner in which the business of the court shall be managed and conducted, the process that shall be issued, the service of that process, or the periods at which cases shall be tried. All this is left to legislative wisdom; and however much I may doubt and deny the *policy*, the *necessity*, or the *justice*, in interfering with or prescribing distant periods for the *trial* of actions, under any combination of circumstances, yet I am compelled by official duty to say, that the discretionary exercise of this power is not meddled with by the constitution, and that it is therefore a portion of that *residuum* of authority retained by the people, and may be exercised by the legislature.

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Again: It is said this act impairs the obligation of contracts.

The tenth section of the first article of the federal constitution declares, that no state shall pass a law impairing the obligation of contracts. What is meant by the terms "impairing the obligation of contracts?" Any measure, I should suppose, which lessens the value of contracts, that gives them a diminished dignity, takes from them any of the properties of contracts, or which devests them of that priority of lien, obligation, or recovery, which they would otherwise possess. This impairing of contracts must mean their partial rescindment by legislative authority. This act therefore, as it does not innovate upon the obligation of contracts, either by a partial rescindment, by destroying any of the properties of contracts, or by diverting the usual operation of the lien, cannot be said to impair the obligation of contracts. The usual periods at which contracts were heretofore enforced by action are protracted: the facilities of recovery have been suspended. But does this impair the obligation of contracts? Certainly not. Their *obligation* remains entire, and a bond or covenant is as valuable, and on the score of obligation, is as operative now, as before the passing of the act.

Under these impressions of the objections I have thus noticed, I am therefore of opinion (bottoming my opinion upon those specific objections) that this *act is constitutional.*

2dly, The second ground of the motion now demands investigation; and the question it involves is, whether under our system of laws, an EQUITY CASE can be denominated a CIVIL CASE.

There can be but this division of cases: 1st, Criminal; 2d, Civil.

Criminal cases are those which involve a wrong, or injury done to the republic, for the punishment of which the offender is prosecuted in the name of the whole people.

Civil cases are those which involve disputes or contests between man and man, and which can only terminate in the adjustment of the rights of plaintiffs and defendants.

It is said however that a critical examination and collation of our statutes establish another class of cases, to wit, equity cases, as contradistinguished to criminal and civil cases. I have taken infinite pains to trace in our laws the lines of distinction between an equity and a civil case; but without adopting implicitly the inferences of the gentleman who contends for this distinction, I can see nothing in the plain letter of the law which creates it.

The argument I think stands fairly thus. The constitution gives to the superior court, exclusive and final jurisdiction in all criminal cases, and in cases respecting the titles to land: *article* 3. *section* 1.

Here then is one distinction between criminal cases and that class of civil cases relating to real property. The inferior courts shall have cognizance, " of all other civil cases:" same *art.* 1 *sect.* Here then is another distinction between criminal cases, and " all other civil cases," cognizable in the inferior courts: and *ex concessu* of counsel there is nothing in the *constitution* which excludes the inferior courts *from* sustaining a jurisdiction over equity suits, under the sweeping clause of all " other civil cases." But the third section of the judicial act of 1799, is I think conclusive as to the scope and latitude which should be allowed to the terms " civil cases." It declares that the said superior and inferior courts, shall have full power and authority to hear and determine all causes, both civil and criminal of which they shall severally have jurisdiction. Now the term " civil," must evidently mean all cases (whatever technical appellation they may assume, in the shape of an action, or chancery bill) which cannot be legally denominated *criminal cases.* The 53d section of the judicial act of 1799, confers a chancery jurisdiction upon the superior courts. Therefore equity proceedings must be denominated civil cases, agreeably to the mode of classification adopted in the 3d section of the judicial act; and I may add that the terms " all other civil cases" used in the 1st section of the 3d article of the constitution appear to authorize a similar conclusion, for the constitution speaks of only two classes of cases, crimi-

nal and civil cases; and it will not I presume be contended that the judicial department can take cognizance of cases which do not fall under one or the other of those classes; the conclusion is then irresistible, that if an equity case is not a civil case, the court has no authority to try it.

This is the dilemma we are are reduced to by establishing, or rather attempting to establish a distinction between an equity and a civil case. Upon the second ground of the motion, I am therefore of opinion that an equity case is a civil case, and that this bill cannot be tried under the prohibitory provisions of the act of assembly, it not being a case relating to the right of real and personal property.

Motion overruled.

Georgia—Chatham County.

The State *v.* Asselin. *Habeas Corpus.* 1808.

CHARLTON, Judge.

THE prisoner has been arrested and committed, by virtue of the following warrant:

" State of Georgia—Chatham County.

" *To any lawful Constable of said County.*

" You are hereby commanded to take the body of *Charles Asselin*, and bring him before me or any justice of the peace of said county, to answer to a charge exhibited against him by *Lewis Mallet*, for enveigling and feloniously carrying off the following named negroes, which the deponent was legally possessed of, to wit: *Sophia* and her son, a child; *Benjamin*, *Delphine* and her son; *Muttpuin*, *Dubin*, *Antonia;* in all eight negroes, and one horse, and bring him and the said negroes and horse, if found, before me or any other justice of the peace of said county, and this shall be your warrant. Given under my hand and seal, the 27th day of *July*, 1808.

" JOHN POOLER, J. P."

This is the language and form of the warrant; and the affidavit of *Mallet*, upon which the warrant is founded, states the commission of the felony in the most positive and unequivocal terms.

The prisoner is now brought up by habeas corpus, and his counsel move for *his discharge*, upon the exhibition of evidence, written and parol, which they contend clearly show that no felony had been committed, and that this prosecution is a mere dispute about the right of property.

It appears from the evidence adduced by the prisoner, that he took possession of the negroes named in the warrant, in pursuance of a letter of attorney from one *Monet*, an inhabitant of the island of *Cuba*, who is admitted, on all sides, to be the legal owner. This letter of attorney is dated at the *Isle* of *Cuba*, 13th *May*, 1808.

The prosecutor, *Mallet*, claims the right to retain the possession, and to exercise a qualified property over these negroes, by virtue of an authority given to him for that purpose, by madame *Monet*, the wife of the proprietor *Monet*, who had delegated to his wife, in a letter of attorney, dated the 8th day of *October*, 1806, a full power to sell or otherwise to dispose of them for his advantage. It was in evidence that when Mrs. *Monet* left this state two years ago, she deposited in the hands of her brother, *Lewis Mallet*, a blank power of attorney, to which she had affixed her seal and name, in the presence of a witness, *P. Dupon*. This letter of attorney transfers to her brother, all the rights relative to these negroes, which she had derived from her husband *Monet*, but was filled up not longer than six weeks ago, and is dated the 30th of *July*, 1807.

Further evidence was offered, to prove that *Mallet* had full notice of the authority given by *Monet*, to the prisoner Mr. *Asselin*, and, consequently, of the revocation of madame *Monet's* authority.

It is unnecessary to dwell on the exchange of these negroes with *Charles Debrosse*, as by the deed of the 7th of *July*, they were repossessed by the agent or attorney of *Monet*.

This, in substance, was the nature of the testimony adduced to repel, and to controvert the round charges of felony stated in the affidavit of *Mallet*, and the warrant of the magistrate.

The felony charged, is of a capital nature, and against my *then* conviction, I (*in favorem vitæ*) permitted this extraneous investigation, urged at the same time by the prisoner's counsel, who felt no doubts as to the admissibility of this kind of testimony, on the return of a habeas corpus.

Mitchell and *Bulloch*, the prisoner's counsel, contended, that not only the general doctrines of the law, but universal practice authorized an examination of *all the circumstances* of the case, as well on the part of the republic as on the part of the prisoner; that this examination was not confined by the principles of law to the depositions taken before the magistrate, but might be legitimately extended to every and all kinds of evidence, which could be produced on *either side*, to show that a felony *had*, or *had not* been committed. And under this impression of the law, they moved for a discharge of the prisoner *Asselin*, because it did appear, from the evidence submitted to the court, that instead of a felony having been committed, this prosecution was founded on the grossest malice, and every bad propensity of the human heart.

These positions having been asserted with much confidence, by my brother *Bulloch*, I hesitated in giving an immediate opinion, from that respect which is due to his professional abilities.

A few hours' reflection, however have not produced any revolution, in the general opinion which I gave yesterday. Whatever sentiments I may entertain of this prosecution, or of the character of Mr. *Asselin*, I feel my conscience and my judgment encompassed by obligations, which I shall faithfully discharge, without permitting my passions to be warped by circumstances which are connected with the relative situation of men in society. I must decide upon principles of law; and when my mind is irresistibly convinced of their applicability to a particular case, I am not at liberty, in order to come at a

purer system of justice, to consult my discretion, or my feelings.

I am tied down by precedents where they do not militate with the constitution or the law. It is the glory of our people, that their rights are dependent upon fixed principles, and those fixed principles are contained in the fundamental provisions of the constitution; in the adjudication of our courts; in the precedents established by our ancestors. The imperial *legibus solutus* is established so soon as a judge sets up his opinion against an uniform current of authorities, which have been stamped with the seal of wisdom, and acquiesced in by the people. The plain and upright *Grose* once said, that it was better for the subject, that even faulty precedents should not be shaken, than that the law should be uncertain. 2 *T. R.* 24.

In this sentiment I concur, and will now proceed to show, upon the authority of precedents, 1st, that it is not competent for the prisoner, on the return of the habeas corpus, to go into a *full defence* of his case, for the purpose of establishing his innocency, or of controverting the facts stated in the depositions of the state witnesses; and 2dly, I will laconically state the reasons, upon which is founded the necessity of an *ex parte* investigation, on a motion to bail, or to discharge the prisoner.

1st, The first case I will cite is that of the *King* v. *Horner*. *Leach*, *C. L. p.* 226. It is there said, that the practice of this court is, and upon a reference to the officers of the crown office, we find it to have been long established, that even when the commitment is regular, the court will look into the depositions to see if there is sufficient ground laid to detain the prisoner in custody; and if there is not, they will bail him.

So also when the commitment is irregular, if it appear that a serious offence has been committed, this court will not discharge or bail the prisoner, without first looking into the depositions, to see whether there is sufficient evidence to detain him in custody.

What depositions are here alluded to? Any depositions which may be offered on the part of the prosecution, or by the prisoner and his witnesses?

Certainly only the former.

The statutes of 1 and 2 *P.* & *M.* and 2 and 3 *P.* & *M.* order, that justices of the peace, when any prisoner is brought before them, on a charge of felony, *shall* take the examination of the said prisoner, and the information of them that bring him, of the facts and circumstances thereof, as may be necessary to prove the felony, shall be put into writing within two days after the examination, and certified to the next general jail delivery.

No prisoner brought before a magistrate is sworn to his examination. 1 *M'Nally*, 47. Nor are any depositions taken by the magistrate, other than those of the persons charging the prisoner with the felony. What other depositions can then be exhibited on the return of an habeas corpus, requiring the cause of the caption and detention of the prisoner, than the depositions of the persons informing against him? No others can be exhibited in aid of the warrant. I am therefore irresistibly compelled to say, that the depositions spoken of in *Horner's* case, are those taken conformably to the statutes of *Philip* and *Mary;* the depositions of the persons bringing the prisoner before the magistrate. By no *data* presented to my mind, can I for a moment suppose, that this case refers to all depositions which may be produced, as well by the public officer as the prisoner himself; because, in pursuance of the requisitions of the statute of *Philip* and *Mary*, no other depositions than those of the informers can be exhibited to the court on the return of the habeas corpus.

This case was determined in the 23d of *George* III.

The next case is anterior in point of date, 13th *George* II. and is as conclusive on this doctrine, as can be conveyed in the *English* language. I will state it in the words of the reporter:

" *Dominus Rex* v. *Greenwood.* " He came up on a habeas corpus, charged with a commitment, for a robbery on the highway, and the *prosecutor* attending said he was the man; and though eight affidavits of credible persons, proving him to have been at another place at the time the robbery was sworn

to, were read, yet the court refused to admit him to bail, but ordered him to remain until the assizes." 2 *Str.* 1138.

Here then was evidence brought forward by the prisoner which proved an *alibi*, yet the court would not depart from the fundamental principles of the law, which, at this stage of the prosecution, confines the investigation to the ex parte depositions of the crown or state witnesses.

Upon the authority of these cases, and the reasoning I have attempted to connect with them, it results, that no evidence extraneous to the depositions and informations taken by the magistrate, ought to be admitted to controvert the facts contained in these depositions, or the charge exhibited in the warrant of commitment. These cases are fortified too by another principle of law, that no one can, in any case, controvert the truth of the return to a habeas corpus, or plead or suggest any matter repugnant to it. 2 *Hawk. p. c.* 113. *Bac. Abr.* 1 *vol. p.* 226, in notes.

2dly, I will now state the reasons which induce the necessity for the adoption of the principles and doctrines advanced.

The first reason is, that if the court undertakes to decide from evidence *dehors*, that which is certified by the magistrate, it consequently goes into a plenary hearing of the merits of the case, and *per obliquum* decides on the innocency or guilt of the accused. It consolidates the facts with the law, against the maxim *de facto juratores, de lege judices respondent*, and against the law and the constitution, which place an ultimate condemnation and acquittal in the hands of a jury. Is there a greater hardship in refusing a full statement of the evidence on both sides before the court, at this incipient stage of the prosecution, than in that other stage of it, when the accusation is delivered to the grand inquest, in the solemn form of an indictment, in which the whole republic complains of an injury to its peace, its government and dignity? And yet the investigation before the grand jury is ex parte.

Another reason is, that if evidence on both sides is admitted at this stage of the prosecution, the court must weigh the cre-

dibility of the witnesses, which is the peculiar *province* of the jury. Cases may occur, in which honest men may be temporarily the victims of perjury and malice; but virtue and integrity cannot long suffer under the benignant reign of our laws. Is the citizen or the man illegally arrested? The indictment and the action for false imprisonment afford an ample redress. Is the citizen prosecuted without cause, with fraud and malice? He finds a reparation in the action of malicious prosecution. Is he falsely charged? The degrading and everlasting punishment of perjury atones for the outrage on his reputation and honour.

At the same time, then, that I feel myself obliged to obey the stubborn principles of law, in opposition perhaps to what abstract principles of justice may suggest, it ought to be a consolation to the persons who must submit to this opinion, that for every injury the law affords a coextensive remedy. Though I cannot receive this evidence on a motion to discharge the prisoner, yet I am not precluded by any principle of law from permitting it to regulate the bail which I conceive it proper to require.

It is therefore ordered, that the prisoner be bailed in the sum of 500 hundred dollars, and two securities in 200 dollars each, to appear at the next court, to answer to a bill of indictment, for the felony charged, and that security in similar sums, to prosecute, be given by *Lewis Mallet*.

Noel for the prosecution; *Mitchell* and *Bulloch*, for the prisoner.

Massachusetts: Court of Common Pleas.

SUFFOLK COUNTY, JULY TERM, 1808.

Gilbert and Dean *v.* The Nantucket Bank.

THE case which is here briefly reported, was founded upon what is commonly termed a *bank bill*, issued by the *Nantucket* bank. The plaintiffs, being possessed of a thirty dollar bill, sent an authorized agent to present it to the bank

for payment, who on a certain day presented the same, and after spending a large portion of the bank hours in the bank, could not obtain payment. All the bills issued by the *Nantucket* bank, are in the same form and worded in a similar manner. By each of these bills "*The President Directors and* COMPANY of the *Nantucket* Bank" promise to pay a certain person, or the bearer, so many dollars on demand. Payment not having been made when the plaintiffs' thirty dollar bill was presented, "The president, directors and company of the *Nantucket* bank," (the words used in the bills) were summoned to answer the plaintiffs in a plea of the case, founded upon the promise contained in the bill, the plaintiffs averring that they were the bearers, and that the bill came to them for a valuable consideration. "*The President and Directors* of the *Nantucket* Bank, the defendants in the action came, &c. and plead they never promised, &c."

The evidence for the plaintiffs was as follows: A witness was called, who testified that on the day named, he was in the *Nantucket* bank, when he saw the plaintiffs' agent come in, and in their name demand payment of a certain thirty dollar bill, which he (the witness) was enabled to identify, because he then put the initials of his own name on the back of it. Upon examination, he said it was the bill declared upon and shown to him at the trial. The counsel for the plaintiffs then offered to read the bill to the jury, but the counsel for the bank objected. The objection was, that there was no such corporation in being as the defendants summoned; that in this action no judgment could be rendered, and if a judgment was rendered, no execution could be levied. The style of the bank in the act of incorporation was *the President and Directors of the Nantucket Bank*; the word *company* was not mentioned. True it was, from accident or design, if you please, the *President, Directors and Company of the Nantucket Bank*, was the name and style of the promisors in the bills issued by the bank; yet because the bank had issued their bills in a *wrong* name (purposely perhaps) and had been sued by the *same name*, therefore the plaintiffs ought not to be permitted to read the bill to

the jury, and ought not to have a verdict, judgment and execution in their favour. This was the substance of the objection.

To this it was replied, that if the defendants were misnamed, they ought to have plead the misnomer in abatement: That now it was too late, after coming in and confessing themselves the real defendants summoned, and pleading in bar: That to permit the objection to prevail was to permit the defendants to defraud the public, and take advantage of their own wrong, &c.

After consultation, the court permitted the bill to be read to the jury; the hand writing of *Joseph Chase*, the president, having first been proved.

It there appeared in evidence, from two witnesses, who were in the bank when the demand was made, one of whom kept a journal of the proceedings there, that the person who acted as teller did not *absolutely refuse* payment, but stated that his rule was to attend to one person half an hour, and if he had not then finished with him, to give the next half hour to the next person in waiting, and so on. The agent of the plaintiffs then waited upwards of an hour, and was afterwards told that his turn could not come before the bank hours were over for the morning. In the afternoon he attended again and met no better treatment, and could not during the *whole* day get his bill paid. It appeared further from the testimony of these witnesses, that the person who acted as teller, (and there was but one person in the bank) purposely wasted the time and avoided payment as long as he could. That to every body *but an inhabitant of the island of Nantucket*, he paid in *fourpence halfpenny pieces;* that he fumbled each of these pieces over between his thumb and finger several times, to discover whether it was a fourpence halfpenny piece or a five cent piece, and when this discovery was made, with a pen and ink and large piece of paper he set down several figures and made a long sum in arithmetic, to find out whether sixteen fourpence halfpennies made a dollar, and this being at last ascertained, *one dollar* was thus paid. In this way half the amount of a bill might be paid in the course of half a day. But the difficulty ended not

here; he would not let you carry half the money away unless you left the whole bill, although you offered to indorse it or give a receipt for it; and you must go away at dinner time and go through the same trouble in the afternoon to get your bill paid. One of the witnesses stated that he was on the island seventeen days and had several bills to be paid; that he attended the bank assiduously every day, and in the seventeen days with the greatest industry and exertions, he was able to get the sum of *four hundred and seventy-two* dollars paid, and no more, which was counted in less than half an hour at one of the *Boston* banks.

The plaintiffs insisted that the shameful conduct of the bank in this case amounted to a refusal, and believed they had proved every thing necessary to obtain a verdict.

The defence was of a singular nature, and as we could gather it from the desultory and immethodical argument of the counsel for the bank, who was for several hours addressing the jury, consisted principally in the following points: he first relied upon the misnomer to the jury, notwithstanding this objection had been overruled by the court. Then he found, or thought he found, some other defect of form in the writ. Then he argued *Gilbert* and *Dean* could not be the *bearers* of the bill, because *their agent* presented it. Then he said there was no evidence of a demand upon the president or cashier, the person in the bank at the time of the demand being neither, and no evidence of a refusal; and having made all other objections that had the appearance of being legal, he next addressed himself to the feelings and passions of the jury. He said that the bank was *run upon*, that the jury ought not to assist in making the wheels of speculation revolve; that the plaintiffs did not want gold or silver money; they had no customhouse bonds to pay, and that the jury ought not to oblige the bank to pay its bills, because speculators wanted to make two or three per cent. by getting specie for the bank note. That in these hard embargo times, no country bank could pay all its bills, and should not be compelled to pay them; that the bank must call in that case upon individuals, and the injury

would spread; and many arguments of a like kind were used, founded upon the supposed inability of the bank, and the compassion of the jury.

The counsel for the plaintiffs made a satisfactory reply to each part of the defence, and commented with some severity upon that public institution, which, incorporated by one name, should attempt to mislead and defraud the public by using another, and ridiculed with much success the weakness of that argument, which contended that a bank ought not to be called upon to give specie for its notes, because it had foolishly or fraudulently issued more bills than it could pay. The stigma of speculation has often been attached to pursuits which compel an unwilling debtor to pay his honest debts; but he saw no dishonourable employment nor unfair gain in asking a person to pay his note of hand, given for a valuable consideration, nor in sending back to their sources the floods of that paper currency, with which the metropolis has been so often inundated by the country banks. It was perhaps of the greatest public utility.

Wetmore Chief Justice, and *Donnison* Justice, then charged the jury, who, after retiring for a short time, returned a verdict for the plaintiffs.

The bank, still unwilling to pay its own bill, moved an arrest of judgment upon a supposed defect and omission in the declaration; which motion was argued near a whole day; but the court eventually decided that the defect was formal only and not substantial, and could not be taken advantage of after verdict, and would not arrest the judgment.

Still determined not to pay its note, the bank claimed an appeal to the supreme court, where many months will elapse before a decision can be had. It may not be improper to add, that there were between ninety and one hundred actions entered in the same court against the same bank, the merits of which are similar to the one above reported; and which will not sooner be determined. Judicious people will make their own comments; and it may perhaps be a question hereafter agitated, whether it be not the duty of legislators to disfran-

chise a corporation which should be guilty of gross misconduct.

Two observations more perhaps should be made. The first is, that *Nantucket Pacific Bank* have always paid their bills punctually; secondly, that "*The President and Directors of the Nantucket Bank*" and their officers, since the above reported trial was had, can tell without the use of pen, ink and paper *how many fourpence halfpennies make a dollar*, and have promptly paid all bills presented to them.

Let us say with an old author, "he is foolish indeed, whom experience maketh not wise."

[From the Paris Argus of October 6, 1808.]

LAW OF NATIONS.

THE court of cassation in *France*, has lately decided an important question which concerns the law of nations and public right, viz. Whether the effects of the right of asylum, relative to fugitive criminals, ceased by the union of the country where the crime was committed to the one in which the criminal has taken refuge. The court decided that these effects ceased; from the motive that the right of asylum is not a personal right belonging to fugitives, but a result of the respective rights of nations, which ceased by their union under the same laws and the same government. This principle, of which the court made a just and rigorous application, occasioned the rejection of the appeal of a man of the name of *Odone*, a *Genoese*, condemned to twenty five years' hard labour, in irons, by the criminal court of *Genoa*, as being convicted of a robbery committed in 1800, in the house of Mr. *Figari*, and for which robbery the said *Odone* was at that time condemned to nine years' hard labour in irons, by default. The rigour of the principles got the better of the consideration that *John Odone*, upon seeking refuge in *France*, had entered into the service, and had even distinguished himself by his valour in the battle of *Trafalgar*

[Selections from late London Papers, 1808.]

Court of Chancery.

Attorney General *v.* Hicks.

THIS was a motion arising upon an information filed by lord *Redesdale*, when attorney general, at the instance of sir *Christopher Hawkins* and lord *Dunstanville*. The grounds on which the information proceeded were these: queen *Elizabeth*, in the 25th year of her reign, had granted letters patent for incorporating the hospital of *St. Lawrence de Pontehy*, near *Bodmin*, in *Cornwall*, for the purpose of maintaining 38 lazars, or leprous persons, of both sexes, and had endowed the said hospital with various lands and messuages, to the value of 150*l.* per annum for the support of these lazars.

That species of pestilence having fortunately become extinct, at least in this country, the endowments of the hospital had got into the hands of other people, who had no sort of claim under the charter of incorporation, and had come into possession of various hands by leases, and of which the defendant *Hicks* was one. An information was filed against these persons by lord *Redesdale*, when attorney general, and the matter was then referred to a master in chancery, to inquire into the appropriation of these funds. From his report it appeared, that there had not been for a considerable period, and was not then, sufficient number of persons who could establish any claim to the benefit of the charity, on the ground of their being lazars, the persons for whose benefit the charity was destined, and that the revenues of the charity had gone into other channels.

This report having come before the chancellor, as the guardian of public charities, particularly those established by the crown, it was suggested before lord *Erskine* that as the grant was made by queen *Elizabeth*, in virtue of her dutchy of *Corn-*

wall, the interests of the prince of *Wales*, as duke of *Cornwall*, were concerned.

Mr. *Richards* and Mr. *Benyon* now contended, that whether the hospital was endowed by the crown, or from the lands of the dutchy of *Cornwall*, yet still it was devoted to charitable purposes alone; and since these purposes had happily become obsolete, it was proper either to receive a new direction, or that the funds should revert to the original donor. They submitted, however, that the lands and messuages appropriated to the support of this incorporated charity did not revert to the donor or his heir, but remained still allotted with the charity to which they had been originally destined. They therefore submitted that the subject be referred anew to the master, who should be ordered to draw out a new scheme of charity, for the support of which the funds might be applied.

Sir *A. Pigot* appeared in behalf of the prince of *Wales*, as duke of *Cornwall*, and contended that as the grant of *Elizabeth* was of certain lands, as of her dutchy of *Cornwall*, the crown could not properly be considered as the donor; and that if the property reverted to the heirs of the donor, it must revert to the prince, as duke of *Cornwall*.

The lord chancellor observed, that in the present stage, he had nothing to do with the question, as it respected the rights of his majesty, or the prince of *Wales;* but there was this informality that would put a stop to further proceedings for the present, and that was, that the information had not been filed by the attorney general.

The application was therefore postponed for some days, till the attorney general could be consulted.

Court of King's Bench.

SITTINGS AT WESTMINSTER, JULY 7, 1808.

North *v.* Miles and Branscomb, Knights, the late Sheriffs of Middlesex.

THIS was an action for a false return to a writ of *ca. sa.* and not duly executing the same.

Mr. *Park* stated the plaintiff's case. The plaintiff in the month of *May*, 1807, had issued a *ca. sa.* against Mr. *Bromley*, who then exercised the office of under sheriff to the defendants, for 200*l.* upon a promissory note. The writ was delivered to the sheriffs to be executed, and a warrant was made to one *Leech*, an officer, to execute it. Upon the return of the writ *Bromley* was not taken, but a return of *non est inventus* was made, and the plaintiff lost the effect of his suit. At this time, Mr. *Bromley* had a house in *Southampton* street, *Bloomsbury;* he had since quitted his house; and was no where to be found. This action was brought to recover damages from the defendants, for not having executed the writ when they might have done it. The *Middlesex* election commenced on the 18th of *May*, and the defendants were attending there in virtue of their office, and Mr. *Bromley* was there also in virtue of his office.

Witnesses being called, *Leech*, the officer, said that he had been several times to Mr. *Bromley's* house, but could never find him; that one evening he had waited for him a long time, and was met by Mr. *Lee*, the plaintiff's attorney, who upon being told of it said it did not matter he would renew the writ. Upon being asked if he had been to the *Middlesex* election, he said he had been there once, but that Mr. *Bromley* was not there.

Mr. *Cater* who attended at the election every day could only speak to seeing *Bromley* there once.

Shepherd, a sheriff's officer, had also writs against *Bromley*, and could not take him.

Lock, a clerk of Mr. *Lee*, said, during the time that the writ was out, he met *Leech* and expostulated with him upon not executing the writ, when *Leech* said, he dared not do it, for Mr. *Bromley* had threatened to suspend any who had the boldness to arrest him, but he would get Mr. *Sheriff Branscomb's* indemnity, and would take him the next day.

Upon *Leech* being called up again by lord *Ellenborough*, he would not swear that such a conversation did not take place, although he said, he had not been prevented by any such threat, but had used all due diligence.

The attorney general contended, that it did not appear that *Leech* could have taken *Bromley* under the writ, and that even if he had taken him the plaintiff could not have got his money, and was therefore not damnified.

Lord *Ellenborough* said, that the question was, whether due diligence had been used; and it was clear that the sheriff might have taken the under sheriff, if there had been an earnest intention so to do. The jury found a verdict for the plaintiff, damages 200*l.*

SHAM PLEAS.

Blewit *v.* Marsden.

THE rule in this case, which we stated in the term, was yesterday made absolute, that the plaintiff should be at liberty to sign judgment as for want of a plea, and the defendant's attorney pay the costs of so much of the proceedings as were occasioned by the sham pleas, which were of an extraordinary nature. The debt was for 200*l.* on a promissory note, and the defendant pleaded that the plaintiff owed him a much larger sum, on occasion of a judgment recovered in *Ireland*, and also a further sum of 2000*l.* adjudged to him in the pie poudre court at *Bartholomew* fair with 500*l.* costs. This was most palpably a sham plea, and there were a great many of them filed in various actions.

The defendant had been ruled to abide by his plea, in which case, it is usual to withdraw the plea, if it is a sham plea, unless some few days' time may be gained by letting it stand, and then judgment is given upon the proceedings as they stand.

Mr. Attorney general regretted that the case was brought before the court, as sham pleading was always overlooked by the court; and it was best for the bar and the attorneys, as well as the suitors, that it should pass *sub silentio*. For this reason we omitted to report the case yesterday, but different statements having appeared, we believe it has been misunderstood.

Lord *Ellenborough*, Chief Justice, in making the rule absolute, censured the framer of this plea. He did not pronounce any judgment against sham pleading in general, because it was impossible to correct it; but he said *dabitur licentia sumpta pudenter;* there must be moderation used. The pleas in this case are palpably false; and they have been framed in such a manner as to involve nice questions of pleading, so that if the plaintiff does not happen to reply properly, the court may be occupied with a long argument. This must not be permitted. If this were allowed, the defendant, instead of saying, "and for plea in this behalf," would insert upon the record, "and for sham plea in this behalf the said defendant says, &c." *Rule absolute.*

DUEL CASE.

Baron Smith's Charge, in the Case of W. C. Alcock, Esq. August 1808.

GENTLEMEN OF THE JURY,

THE prisoners at the bar, *William Congreve Alcock* and *Henry Derinzy* stand indicted for the wilful murder of the late *John Colclough*. Against the former of these prisoners, the evidence perhaps establishes the charge to this extent; and if you should believe the other to have aided and assisted in the commission of a homicide at which he certainly was present, he also, in contemplation of law, would be a capital offender. An

endeavour has been made to fasten upon *Alcock*, a malice distinct from that which the law implies from the act which he has done. The attempt, I think, has altogether failed. But though it had succeeded, it might still have been a vain one. For to what purpose go into proof of what the law infers? Or how could any accumulation of criminality aggravate the homicide which has been committed, into more than murder? It would be insinuated that Mr. *Colclough* fell a victim to the general and deliberate malice of the prisoner. That this latter came upon the hustings, determined to manage his election with pistols in his hand, and to put down all opposition to his interests by the terror of personal responsibility and an impending duel. But whatever may have been insinuated, no such mischievous intentions or dispositions have been proved. On the contrary, the fatal meeting in this case seems to have originated in unforeseen and sudden irritation; insomuch that if the duel had followed upon this, more quickly than perhaps it did, it might be doubted whether the homicide in which it ended was more than a manslaugher. That the transaction which irritated *Alcock* was casual and unexpected, and even that it produced astonishment in him and his supporters, is not only in evidence, but has been proved on the part of the prosecution. Of animosity or illwill between the prisoner and the deceased, it is not enough to say that there is no proof. The very reverse of malice has been shown; and on the day before the unfortunate catastrophe took place, they appear to have shaken hands in a familiar and cordial way. It has indeed been suggested, and I think shown, that *Alcock* selected the deceased as the person responsible for the grievance of which he complained. But was he so far wrong? I conceive not. He was culpable indeed in the kind of responsibility which he imposed; but not in his choice of the person on whom to cast it. If he had sought to make him answerable in another and a legal way, I should not hesitate to say, that Mr. *Colclough*, the candidate himself, was properly selected and applied to, in preference to any of his agents. Nay, if duels were to be, what they ought not to be, endured, and if every subordinate agent

was to answer personally for the misconduct of his own department, whatever benefits might result from such a system, the sparing of human blood would not be amongst the number. Mr. *Colclough* has also been represented as a martyr to a constitutional principle: to the freedom of election, and right of every voter, however humble his situation, to exercise his franchise idependently and free; for example, from the coercive influence of his landlord. To this view of the case there is a preliminary objection. It might seduce you to the finding an unwarrantable verdict: one founded upon political, not legal grounds. You are not to convict the prisoners, because you think the elective franchise should be unshackled: nor to acquit them, because you hold it to be wholesome and expedient that the influence of landlords on their tenantry should extend itself to this control. But there is no pretence for the allegation that Mr. *Colclough* was such a martyr as is described. Mr. *Alcock* had tolerated without complaint, on this election, the opposition of tenants whose landlords voted for him; and all he deprecated and resented, on the occasion which produced this most unhappy quarrel, all his supporter, Mr. *King*, protested against on the hustings, was a measure violating, not promoting the freedom of election; and which was as unconstitutional as it was ungentlemanly, clandestine and unfair. That such measures had been resorted to, was there not more than sufficient reason to suspect? Was it possible to resist the impression made on *Alcock* and his friends by the conduct pursued in the booth by Mr. *M'Corde?* No private conference with the tenants was required by Mr. *Roper;* and if all was fair, why was he not allowed to read the letter? Why was all access to them effectually prevented? If no contrivance, more dexterous than candid, had been practised, why was the business conducted with a triumphant sneer? Mr. *Roper's* testimony perhaps will show by whom the quarrel was produced; and we may by and by consider who prevented all accommodation. If an averseness from every thing like conciliation be evidence of malice, this averseness is to be found, not amongst the friends of Mr. *Alcock*, but amongst those of the deceased. The challenge unquestion-

ably was given by the former, but it was not given absolutely. An alternative was offered, which Mr. *Colclough* did not accept. I allude to that interview in the street, when, holding what may be called the title deed of his resentment in his hand, the prisoner stated his supposed grievance, and the redress which he required. At the time of this expostulation, he was under the warm influence of those impressions which the recent conduct of *M'Corde* had been calculated to produce. In this interview he spoke the intemperate language of passion; that is to say, he uttered the indiscreet effusions at once of anger and of truth. Yet thus irritated, and incapable of all dissimulation, he left an inlet, and what he conceived to be a fair one for accommodation. Mr. *Colclough* indeed denied (and I am persuaded with perfect truth) all dishonourable and indirect proceedings upon his part. Mr. *Alcock* at once admitting the truth of the disclaimer, however felt it to be only a denial f personal interference; and explained himself by fastening his charge upon the agents; and if my memory serves me, distinctly on *M'Corde*. Here we find an open. Did the deceased avail himself of it? Yet what was there to prevent his doing so? What at least was to prevent his taking a middle course? He might have offered to institute an inquiry into the conduct of his agents; and undertaken that the polling of the disputed tenants, or at all events his profiting by their support should abide the result of this investigation. Mr. *Alcock's* challenge of him was hasty. But haste is not malice. If they be not incompatible, at least they are distinct. If, however, in delivering the defiance, there was haste upon the one side; in forcing on the meeting, there was deliberation on the other. Of the terms at first required, much was afterwards abated. *Alcock* offered to accept one vote from the tenants; and leave the other to his rival. Would this offer have been rejected, unless the suspicions of tampering were well founded, or a quarrel was desired? The answer to this offer was a flat refusal; and it was added that Mr. *Colclough's* carriage was in waiting; and they must go out. This offer was made by Mr. *Alcock's* second; (I give the gentleman his ille-

gal title;) who with a laudable perseverance in advocating peace, called three times in the hope of procuring an interview with Mr. *Colclough*. Once he called alone; a second time in company with lord *Valentia;* and, after his lordship's attempt at reconciliation had proved ineffectual, not yet discouraged, he for the third time called alone. If lord *Valentia's* message was from the committee, it was however fully and expressly sanctioned by Mr. *Alcock;* his acquiescence was required by lord *Valentia*, as a *sine qua non* to his undertaking the communication; and this acquiescence was testified by the attendance of the second. Again, if this message contained a mere proposal of postponement, yet this might, and probably would have led to accommodation; and in the meantime what punctilio could stand in the way of assenting to it? Lastly, if Mr. *Colclough's* friends did not wish to treat with the committee, or for a mere postponement, the visits and propositions of Mr. *Percival* seemed calculated to meet both objections. He came not from the committee, but from Mr. *Alcock;* not to adjourn the duel, but to reconcile the parties. He wished to see Mr. *Colclough;* but all admittance was refused. He was as inaccessible as the tenants of Mrs. *Cholmondely* had been before. Mr. *Percival* thought, if he could see him, that matters might be settled. I am of the same opinion. I believe if Mr. *Colclough* had been seen he might be still alive. But the only answer returned to these pacific overtures, was a formal denunciation of "*unpleasant consequences*," if the meeting did not take place in half an hour. There is perhaps a sense in which it may be said that the pistol, by means of which Mr. *Colclough* fell, was not put into the hands of Mr. *Alcock* by Mr. *Percival* or Mr. *King;* but by one who professed a friendship for him whom it deprived of life. There was indeed a friend of the deceased who appears to have recollected the duties, both of his friendship and his cloth. In his communication, though an angry one, with him the prisoner does not seem to have been averse from accommodation. I am unwilling to reflect upon the conduct of a gentleman to whom an opportunity is not afforded of vindicating himself. But I

cannot avoid expressing my regret, that in the interview to which I allude, colonel *Pigott* did not second the conciliatory views of Mr. *Dudley Colclough*, more than he appears to have done. But malice is also sought to be imputed to the prisoner, from certain circumstances which occurred upon the ground. The prosecutor's objection is not so much to the murder, as to the way in which it was committed. The prisoner wore spectacles; and Mr. *Colclough* would have had a better chance for life, if his antagonist had not been so assisted. It is probable he would: and this chance would have been still better if, accommodating him still farther, Mr. *Alcock* had fought blindfold. But can no meeting be what duellists would call fair, unless one of the combatants wears a bandage on his eyes? Somewhat similarly situated is a nearsighted man without his glasses. The prisoner is shortsighted. Perhaps his declarations on the ground, being part of the *res gesta*, are evidence of this. But it is the less necessary to inquire whether they be so; because, *aliunde* the fact is very fully proved; and he appears, at the meeting, to have worn the ordinary spectacles of a nearsighted man; spectacles which he had before been accustomed to make use of; and had not provided for this particular occasion. What a combination of the powers of different glasses may effect, is beside the question. But it seems sufficiently plain, that no single lens can, at most, do more than supply a defect of vision; and put him who labours under it on a footing with the man of perfect sight. If a man of naturally good eyes had a right to fight a duel, I should say that one of artificially good eyes must have the same. But the deceased also laboured under a defect of vision. This might be a reason for his using glasses; but could be none for his antagonist's consenting to do without them. All this latter could be supposed to know was, that he himself, without spectacles, could not see. But he was not bound to be so accurately acquainted with his adversary's infirmity as to know, that if both fought with the naked eye, they would be two blind men, consequently on a par. If they were not so, it was through the omission of Mr. *Colclough's* friends that it was otherwise; and the prisoner ought not to suffer for their de-

fault. But if the circumstance of the spectacles were in fact entitled to the stress which is laid upon it, would Mr. *Henry Colclough* have suffered the duel to proceed? Would he have confined himself to the mere threat of an indictment? Would he have even consented to give a signal, which in that case must have been for the assassination of his friend? If glasses could not be provided for Mr. *Colclough* on the spot, why did not his second require an adjournment of the meeting until they could be procured? Can we doubt that this requisition would have been instantly complied with? But Mr. *Colclough* had not been accustomed to wear spectacles; and Mr. *Alcock* had. And what is the natural inference from this? That he who did not use them did not want them; and that he who did, stood in need of their assistance. The change of dress is as immaterial as the glasses. This must have been either casual, or resorted to merely as a defensive measure. It was adopted on that side on which ten paces were made choice of as a safer interval than twelve, and on which it was requested that the signals should be given rapidly, with a like view to prevent mischief. As to the interference of *Derinzy*, however culpable in law, it does not appear to have been either sanguinary or officious, except in a good and unusual acceptation of this latter word. Not meddling, because he was selected as a friend of the other prisoner; and not bloody, because the tendency of what he did was not to endanger Mr. *Colclough*, but only to diminish the chance of Mr. *Alcock's* being hit.

Gentlemen, I have been compelled to enter into details, and to adopt expressions which may indirectly seem to give what I would, on the contrary, most scrupulously withhold, any thing like sanction or approbation of these dangerous and illegal meetings. They are not to be justified under any ordinances, either human or divine; and I protest against being for a moment supposed to give them countenance, from any language into which the peculiarity of the evidence may have betrayed me. Very peculiar, indeed, that evidence has been in the course of which we have seen the phenomenon of two capital offenders appearing, not at the bar, but on the table; not to

take their trial, but to give their testimony unmolested, under the eye of the prosecutors; and on a bill of indictment for the very offence in which they have had a share. Two indeed there are, both of whom, since persons thus circumstanced are produced as witnesses, we might have expected to come forward. I mean Mr. *M'Corde* and Mr. *Henry Colclough*. The absence of the latter is not satisfactorily accounted for; and that of the former is not accounted for at all. All we know is, that they might have thrown some light on this transaction, and that the prisoners were entitled to have this light thrown on it. In any obscurity in which their absence might have left it, they have, on the same principle, a right to whatever presumptions you can form in their behalf.

[With these observations, the learned judge accompanied his statement of the evidence; after which he closed his book; and after pausing for a moment, he proceeded to address the jury in the following words:]

Having thus recapitulated the evidence, as it appears upon my notes, it remains for me, in addition to the remarks which I have already made, to address to you, gentlemen, such few general observations, as a case so simple in its nature and circumstances will admit of: for simple in its nature and circumstances this case is; although you cannot fail to have observed not merely the reality, but if I may so express it, the parade of interest and sensation, with which it has been thought expedient to mark the present trial. Between us however, and this interest, between us and this sensation, there is, and ought to be, an impassable abyss. Law, justice, impartiality, are to be our guides; with prejudice and passion we have nothing to do, but to subdue them. One only feeling is permitted to enter into our deliberations, and to influence our decisions; I do not mean a feeling of party rancour or revenge; but that mild sentiment of mercy, which softens and pervades our law. In the county in which our circuit commission was first opened, very serious disturbances, and even tumults had prevailed; and it became necessary that the law should put forth its terrors, for the restoration of the public peace. Yet there, justice was not

stimulated; perhaps, I might even doubt whether it was properly assisted. Some disturbers however were tried, found guilty, and suffered death. But though these were not only salutary, but necessary examples, their trials, convictions, or executions, seemed to excite no considerable portion of public interest or attention. How different is the case of the charge which we are now trying! Yet strip it of the trappings and aggravations, with which I know not whether party zeal, or a more justifiable motive has sought to clothe it, and what does it amount to? To a transgression, with which we must on the one hand confess ourselves to be almost as familiar, as we must on the other hand admit it to be highly culpable and illegal. Two persons, disclaiming and violating the municipal law, prefer paying obedience to a false and mistaken code of honour; and one of these disclaimers falls, in a premeditated duel, forbidden by the law of the land; but which the erroneous system of punctilio, to which I have adverted, enjoins in some instances, and permits in many more. No sooner has this melancholy catastrophe taken place, than the friends of the deceased commence a vigorous prosecution against the causer of his death. But some of these prosecutors we may presume, we even know, to have themselves been present, aiding and assisting, at the perpetration of what they now represent to have been a murder: and in strictness of law, their representation is a just one. Some of these prosecutors we may conceive to have at one time been desirous that their champion should inflict the death which he has suffered; should do the very act, for which they now prefer a capital indictment. If abjuring the code of honour, and adhering to the rules of that, which we are here assembled to administer, the prisoners or the deceased had declined to accept a message, or been tardy in sending one, we may doubt whether these strenuous assertors of the law would not scorn to associate with such strict observers of it, and reward their pacific conduct with indelible disgrace. Thus, on the object of their blame, a hard alternative might be thrown; of being posted as a coward, or indicted for a murder. But when a man of amiable qualities and estimable

conduct, as I believe and almost know Mr. *Colclough* to have been, a public man, their friend and favourite, has fallen, his mourning adherents may think themselves entitled to have blood for blood, and to make the law an engine of private resentment or political revenge. In short, in seeming to demand justice, they may be only looking for retaliation.

Be this however as it may, my duty remains the same: my duty is to state mercifully what I conceive to be the law. Homicide, committed suddenly, on sufficient provocation, in the heat of blood, or ensuing on an unpremeditated quarrel, is manslaughter. But of this species of offence there appears to be no evidence in the present case, under any view which you would be likely, or perhaps warranted to take of it. But if homicide ensue on a deliberate duel, between parties meeting with deadly weapons, by appointment, such homicide will be murder, and expose the slayer to the heaviest penalties of the law. An attempt has been made to distinguish the present from an ordinary case. But I will not wound the feelings of the prisoner at the bar, nor insult your understanding, by dwelling longer on this topic than while I say, that the attempt appears to me to have been utterly unsuccessful; and the prosecutors to have more than failed to prove the prisoner an assassin. If indeed they had succeeded, his crime would have peculiarly called for the vengeance of the law; and in administering its rigours, you would not feel compunction. But, however fair the duel, the homicide ensuing on it is a murder. I feel some natural reluctance in stating this to be the law; and you may feel uneasiness at being reminded that it is so. However much and justly such combats are to be blamed, you may more abhor the sanguinary notions which produce them, and pity the victims of a law of opinion which you strongly wish to be repealed. You may have sons, you must have friends and relatives yourselves, and will ask of your consciences and hearts, whether the pride and infirmity of human nature might not lead you to wish that these should rather violate the law, than endure the scorn and contumely of (heaven knows!) an unsparing world, or incur the slightest stain or blemish on their honour. You will wish to

give the prisoner the benefit of these reflections: but whether you would be warranted to do so, is what I scarcely dare inquire; otherwise than by suggesting cases, which I conceive to be similar in their legal nature, for the purpose of illustrating and explaining your duties here. If an officer, at the head of his regiment, be called a coward and a scoundrel, and instead of cutting the offender down, challenge and kill him in a duel, he is a murderer by law; and if you are bound to find the prisoner *Alcock* guilty, you would be equally obliged to return a verdict of conviction against a gallant officer, under the circumstances which I have described. Yet on the other hand, the military punishment and intolerable disgrace, which must inevitably follow from his submitting to the affront, it cannot be necessary for me to dwell upon. If an aged and infirm, a beloved and respected parent be insulted and reviled, or even struck and beaten in the presence of his son, and this latter happen to kill the aggressor, in a regularly appointed duel, the transaction will be murder; and if you cannot acquit the prisoner, you could not acquit the child. If a husband find his wife in the embraces of another, and kill him unarmed and unresisting, on the spot, this is manslaughter of the lowest and most venial kind. But if, giving the adulterer farther time for preparation, and a fairer chance for life, he puts arms in his hands, and meets and kills him in a duel, the offence altering its character, becomes at once a murder; and if you are bound to convict the prisoner here, you would be also bound to a conviction in the case which I have supposed. Not because in morals the criminality is equal; but because both offences are murder in the eye of law. But let me ask of your consciences and your hearts as men, could you convict the officer, the husband, or the son? I have hitherto confined my observations to the case of *Alcock*. That of the prisoner *Derinzy* is somewhat different in its nature. But I have already observed that his interference does not seem to have been either bloody or obtrusive. At all events, he cannot have assisted in the commission of a murder which was not committed; and an acquittal of the first principal would therefore exculpate him. I will not

repeat, lest I might seem to inculcate the austere doctrine of the law: in once stating it, I conceive that I have sufficiently discharged my duty. Nay, even sitting where I do, I think myself warranted in doubting whether this doctrine be not a sort of anomaly in our code: existing in theory; almost abrogated in practice; by the astuteness of judges, the humanity of jurors, the mercy of the crown. Ill assorted to the manners and habits of these times, it seems indeed to have survived its day; and in the shifting of the social scene, to have been left inadvertently behind. This, gentlemen of the jury, was all I had to say. The evidence is before you. If you believe it, you have heard its legal result from the bench. You have the law of the land, bearing witness against the prisoners, on the one hand; the law of opinion on the other, endeavouring to excuse them: the one prescribing rigour, the other suggesting mercy. It is for you to pronounce which call you will obey. The trammels of my office forbid my adding more. But there is another far better voice than mine, to which, though I be silent, you may listen still. I mean that still small voice of which we read in the scripture, and which addresses itself to the consciences of good and pious men in the soft and soothing accents of clemency and peace. Its dictates may be followed, with a confidence the most implicit. It is the voice of him who cannot err; who cannot lead his creatures into error; who to justice without blemish, unites mercy without bounds; who, all criminal as we are, can yet acquit us and be just. To the influence of these secret and divine monitions, and (as far as infirmity can follow) of this divine example, I surrender you; and commit the case of the prisoners at the bar. I wait with some anxiety and much impatience for your verdict; judge whether I am impatient for a capital conviction.

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TORTOLA, AUGUST 6, 1808.

THE case of the schooner *Derne*, *Alexander Thompson* master, taken on the 5th of *July*, 1808, by his *Britannic* majesty's frigate *Ethalion*, commanded by captain *Fahie*, on her homeward bound passage from *Guadaloupe* to *Baltimore*.

The following is the decision of judge *Robinson*, after a deliberation of two days.

I have given the case of the schooner *Derne*, *Thompson*, master, and authorities cited, the agreements adduced, and the evidence and documents, the best consideration in my power. It is out of the usual range of cases that have hitherto engaged the attention of this court. Three causes have been assigned on the part of the captors as implicating the property in question, any one of which being established they contend is sufficient for the purpose of their clients. First the vessel had been dealing in navy bread and salted provisions, articles contraband of war, with the enemy at an enemy's port: next that she had been employed in the coasting trade, and had been trading from *Bay Mahon* to *Bassaterre*, two ports of the enemy in *Guadaloupe*, contrary to the instructions of *January*, 1807; and lastly, that the vessel was fitted for war, had gone to a port of the enemy, continued there a considerable time in an ambiguous character, afterwards proceeded to another port, took on board a cargo not properly documented and was taken returning, having a manifest intention of resisting the visitation and search of *British* cruisers, when it could be done with any probability of success, which is a departure from neutrality and the assumption of a hostile character, that will subject the whole property in question belong to whom it may to condemnation. With respect to the provisions disposed of at *Guadaloupe* said to be of a contraband nature, I have already delivered my sentiments that it can work no harm, being

the production of the country the vessel belongs to. With regard to the coasting and trading between two ports of the enemy, that subject is peculiarly circumstanced, as depending on a seroon of indigo, of which no mention is any where made but in a receipt given at *Bay Mahon* from the former mate and the present master, from the tenor of which in the ordinary acceptance of things it is rather to be presumed was on board than as has been suggested; or, otherwise some order for the delivery of it would I conceive have accompanied the receipt; and I am inclined to think it not likely a master of a vessel going to *Guadaloupe* would leave a seroon of indigo behind unsold, in a country where it would always command a price and with the proceeds of which he might have profited by an adventure, notwithstanding the embargo. A seroon of indigo is not of great bulk and might have been secretly and clandestinely introduced by the mate without the privity of the master in the first instance, and has probably by him been since disposed of; and the smallest trading in opposition to the terms of the instructions, I apprehend would be fatal. Yet if this cause depended wholly on that transaction, as it appears to have been a business between master and mate, and not with the enemy, with the privity of the master, I should not think it such a trading in the terms of the instruction as would or ought to involve the present property in condemnation. The last cause assigned is however to me a weighty and important one, accompanied with the circumstances attending it. A vessel called the *Ohio* some months past is said to have carried a cargo belonging to Mr. *Lemuel Taylor*, of *Baltimore*, and a supercargo, Mr. *Holden*, to *Guadaloupe*, to have returned in ballast as the present master says; but the documents show that she returned with 15 hogsheads of sugar. That was not returning in ballast; certainly it was however but a little better. It does appear that the present master, *Thompson*, was privy to what she carried back; he might and probably was informed she had returned in ballast, and might so have expressed himself. I cannot suppose he meant in that particular any imposition on the court. Mr. *Taylor* in one of the docu-

ments swears that he sent out the brig *Eliza Ann* to bring back the proceeds of the brig *Ohio's* cargo, and we hear nothing more of the *Eliza Ann* than what appears in *Holden's* accounts of a balance due him on her cargo. It is pretended that the *Eliza Ann* carried nothing back but the returns for the cargo she carried out. This rests wholly on the suggestion of counsel. Then follows the present vessel, the *Derne*, on her first voyage, armed and equipped for war, with 25 men, 4 carriage guns, pikes, and small arms. A vessel having a most formidable appearance and apparently a fast sailer, originally destined for *Point Petre*, but who appears to have stolen into *Bay Mahon*. I say stolen, because a vessel appearing in sight, it seems to have been thought more advisable to put in there than to proceed on her original destination. This, in my apprehension, implies a consciousness of something that would not bear an investigation. She has no notarial departing from Mr. *Taylor*, as the *Eliza Ann* had, of going for the returns of the *Ohio's* cargo. Mr. *Taylor* appears to have thought something of that kind necessary for the *Eliza Ann;* and in my mind something like it would have been more prudent and necessary for the *Derne*. On the contrary, the only document from Mr. *Taylor* is the letter of instruction to the master, which is very general, has no allusion to the *Ohio* or *Eliza Ann*, but directs the master to obey the orders of Mr. *Holden;* or, in case he should have returned with *his*, (Mr. *Taylor's*) property, then to take freight. I do not observe in Mr. *Holden's* letters any intention of returning from *Guadaloupe*. The *Derne* continues at *Bay Mahon* about 20 days, apparently doing nothing; afterwards proceeds to *Bassaterre* and takes in the present cargo, with some additional hands. The motive for so doing may have been commendable, but the detention of such a vessel must have been expensive. The pretext that *Holden* was loading a schooner and could not attend to the *Derne* until the other was full, strikes me to have been a flimsy pretext. The *Derne*, having at length taken in her cargo, sails, is discovered and chased, uses many endeavours to escape, which in an ordinary case I would excuse; but is at last captured. The pretext for

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arming was that war was expected between *America*, *England*, or *France*. That it was such that she might defend herself in either event, and yet she sails for a *French* island; had she gone to a neutral country it might have been permitted. I apprehend a vessel so circumstanced ought not to go to the country of either power she apprehends war with; because the other party in such case in my judgment has good cause to construe such conduct illicit and unneutral: and a manifest intention of taking, (should a war ensue) an active and decided part against *him*, which the laws of war do not in my apprehension admit. All circumstances combined, lead me to conclude that the present vessel was sent out either for sale or as a cruiser; or, to cruise against *England;* that the parties must have had in contemplation a war with *England* and not *France;* for, in the latter case, it would be sending the vessel to certain condemnation. I am also inclined to think the court is not in possession of all the facts of this case as to what was actually meditated with this vessel. The cargo she had on board could have been no object; the number of men I conceive to have been more than necessary for an ordinary trading; and although true it is, she was on the return voyage, when whatever might have been originally the design is to be considered as abandoned; to me it may be so, but I am not altogether satisfied that it was wholly so; on the contrary the conduct of the parties seem to me such that had they on the return met a vessel of inferior force, or such a vessel as could have been resisted with a prospect of success, I am disposed to think resistance would have been made; and that the original hostile purpose was still in existence. The property of the cargo I am not satisfied with. The usual affidavit does not accompany it. It would not have been conclusive certainly if it had been; but why depart from *prevailing practice*, which can do no harm. The whole of this case, in my judgment, is so unfavourable to the claim interposed, as to induce the court to reject it, and decree condemnation of the property in question in the first instance; and I feel it my duty to do so. The parties concerned have in their option to clear up this myste-

rious business before a higher and more enlightened tribunal, if they think it advisable to do so.

Halifax—Court of Vice Admiralty.

JANUARY 26th, 1808.

The Rights and Powers of CAPTORS and PRIZE AGENTS, over Captures and Proceeds, before final Sentence, considered: being the substance of a Judgment upon the return to a Monition in the Case of the HERKIMER.

DR. CROKE.

THE case which now remains for the decision of this court, arises upon a monition issued against *Andrew Belcher*, esq. "to bring into the registry the sum of £.41,671 19*s*. 4*d*. being the proceeds of the ship *Herkimer* and cargo; and also interest thereon at the rate of five pounds per centum per annum, to commence from six months from the day of sale; or to show cause why he should not pay the same." This vessel and cargo were condemned on the 1st of August, 1806; and an appeal was entered on the 6th of the same month. A decree of unlivery and appraisement was sued out; and, on the return, the valuation of the ship appeared to be £.3000, of the cargo £.37,896 5*s*. 3*d*. making in the whole £.40,896 5*s*. 3*d*. currency. A motion was made by the captors to take the property upon bail, but difficulties having occurred in procuring securities, the parties jointly prayed the court to direct a sale of the property, and the proceeds to be paid into the registry. The commissions for the sale of ship and cargo issued on the 18th and 27th of *September*, returnable in the usual form in one month. The sale by public auction was made on the 29th of *September*, 1806, by Messrs. *Hill & Co*. The conditions were, that the purchase money should be paid in six months, when Mr. *Belcher* became the purchaser of the ship, and the greater part of the cargo, for the sum of £.41,671 19*s*. 4*d*. The marshal returned the commission of sale, without the proceeds, which he alleged

were in the hands of the purchaser, to whom he had applied for payment, but without effect. Upon the 23d *September*, 1807, a general order of the court was made for all purchasers of prize goods to pay in the proceeds. No notice of this order was taken; a second general order was then made upon the 29th of *December*, and a monition was issued against Mr. *Belcher*.

To this monition an appearance has now been given under a protest against the jurisdiction of the court, which it will be necessary first to consider, because if the court has gone beyond the line of its authority, the party is entitled to his dismissal.

The substantial part of the protest alleges, "that the said ship *Herkimer* and her cargo were sold at public auction by *Charles Hill & Co.* of *Halifax*, auctioneers, in pursuance of an advertisement inserted in the public newspapers of *Halifax* inviting purchasers to the said auction; that the proponent was one among the bidders at the said auction, and being the highest bidder for the said ship and cargo, did purchase the same of the said *Charles Hill & Co.* for the sum of £.41,671 19*s.* 4*d.* and received from him *a bill of parcels of the said purchase in the name of the said Charles Hill and Co. as auctioneers, and not as persons acting under the authority of this worshipful court, as appears by the said bill of parcels hereunto annexed*, and the proponent humbly submits that the said *Charles Hill & Co.* alone can be entitled to enforce the payment of the said £.41,671 19*s.* 4*d.* so bid by him for the ship *Herkimer* and cargo as aforesaid. This proponent therefore humbly prays the judgment of this worshipful court, whether he the proponent is bound to submit to the jurisdiction of this court in the matter of the said monition."—"Sworn to and signed by *Andrew Belcher*."

In arguing upon this protest, it was assumed by counsel that the contract of sale was made merely with the auctioneer, and the sale itself not under the authority of the court of admiralty; I do not think it at all material to the case, but the facts will not bear them out in this assumption. The advertisement in the public papers expressly stated the sale to be made by

the authority of the court of admiralty; the bill of parcels, annexed to the protest, is headed "*Andrew Belcher*, esq. bought of *Charles Hill & Co. at Admiralty sales;*" and it is to be observed that Mr. *Belcher* has not sworn positively that he *purchased* the goods of Messrs. *Hill & Co.* merely as auctioneers, and not as persons acting under the authority of the court of admiralty, but that Messrs. *Hill & Co.* had so stated themselves in the bills of parcels.

But admitting the fact in its fullest extent, still there is nothing upon the face of the monition itself, or in this protest which can oust the court of its jurisdiction. The respondent is monished to pay a certain sum of money which is alleged to be the proceeds of the ship *Herkimer* and cargo. Upon that allegation the jurisdiction of the court is founded. Mr. *B.* admits that he is in possession of those proceeds. Whether he purchased them at public auction, whether he may be answerable for the amount to Messrs. *Hill & Co.* is perfectly irrelevant, for the stubborn fact still remains unshaken, that the respondent is in possession of the proceeds of this ship and cargo. Whatever matter therefore may be pleaded in answer to the monition, the admitted fact is sufficient to found the jurisdiction of the court; which has the exclusive cognizance of prize, and the proceeds of prize, with all incidental questions which may arise.

The court will naturally feel some degree of delicacy in discussing the subject of its own authority. It affords, therefore, a considerable degree of satisfaction, that it is able, not to rest the point upon its own assertions, but rather, to refer to the decisions of other courts of justice, those of *Westminster Hall*, and in cases of prohibition.

The solicitor general quoted a *dictum* of lord *Kenyon*, in the case of *Smart* v. *Wolff*, in support of this protest, "that if the legal property in prize goods was altered, as by sale *in market overt*, the court of admiralty might no longer have jurisdiction over them." In the first place, this mere *obiter dictum* of that eminent judge, expressed too with some hesitation, was not admitted by another judge upon the bench of no less respecta-

bility, Mr. Justice *Buller*, who doubted, supposing the plaintiffs *had* obtained these goods under a legal title, under which "they might have retained the possession, whether that circumstance would be a ground for prohibition." Supposing, he says, that they had obtained the possession of them in market overt, or under any legal title, still I think a prohibition ought not to be granted on that account, "because," he adds afterwards, "that he does not see why they could not defend themselves upon that plea in the admiralty, as well as in other courts."

But, secondly, to make this *dictum* applicable to the present case, it should have been a monition to call in the ship and cargo themselves. Had a monition to that effect been directed to a person who had *bona fide* purchased them at public auction, whether under the marshal's authority, or in the common course of trade, the party might have availed himself of lord *Kenyon's* opinion, as far as it was valid; but this is a monition not to call in property sold in market overt, but the price, the proceeds of that property so sold, and which are admitted to be in the parties' hands.

Upon *that point*, this case of *Smart* and *Wolff* is decisive. It was there adjudged, that the court of admiralty has the power, which it has repeatedly exercised, of issuing monitions to require persons to bring in so much of the proceeds of prize as remains in their hands, *as having the possession of the proceeds by whatever means they may have been obtained.* "The proceedings in that case were said by judge *Buller* to have been founded on the plaintiff's *having the possession of the proceeds*, in which character they are amenable to the court of admiralty."

In the case of the *Danish* ship *Noysamhed*, 7 *Ves. junr.* 593, a prohibition was moved for upon grounds something similar, though still stronger, than what is stated in this protest, and have been argued so warmly by the advocates, namely, that the contract was with the auctioneer, mere matter of account with him, and perhaps settled. A cargo was condemned by the vice admiralty court at *Tortola*, was sent to *Chorley* at *Liverpool*, and was sold by him for the benefit of the captors. The court of appeals reversed the sentence and decreed restitution. A

monition issued against *Chorley* for the proceeds. He moved for a prohibition on the ground that the property was consigned to him, *not as a prize agent, but as a general merchant, and that he had since accounted for the proceeds to the consignors*, but the lord chancellor thought *that* a question proper for the court of admiralty to decide, as incidental to the principal question of prize; and that therefore he was not authorized to grant a prohibition.

In a subsequent case, *Willis* against the Commissioners of Appeals in Prize Cause, *East.* 5. 22, it was thus laid down by lord *Ellenborough*, "It is clear that the court of admiralty has jurisdiction *in rem*, and may take into its possession the thing itself, *or the proceeds wherever they may be found, either in the hands of the principal captor, or agent, or of any other*, who has no lawful title to hold them." And justice *Laurence* adds, "it is supposed that the prize court has jurisdiction over the agent only under the prize acts; but that is not so; for, if those acts had never been passed, that court would have had jurisdiction over the *res*, and the proceeds of it, *into* whatever hands they get."

These cases clearly show, that the jurisdiction of the court of admiralty over prize, and the proceeds of prize, wherever they may be found, and under whatever title they may have been obtained, is almost without limit or control, and that the grounds stated in the protest, and in the arguments adduced by the gentlemen at the bar, are not founded in law; and I therefore overrule the protest.

The monition then having been issued within the proper jurisdiction of the court, the respondent is bound to comply with the requisition contained in it, either by paying the money or showing cause why it should not be paid. This he has done in his answer and return upon oath.

In this he states "that a proposal was made by the claimants after condemnation to purchase the ship and cargo from the captors; after much negotiation the captors consented to sell the same to the claimants for £.24,000 *Halifax* currency. That captain *Henry Whitby* who captured the ship, told the

respondent that he would prefer taking £.24,000 to the receiving the proceeds three or four years afterwards. That in consequence, captain *Whitby*, his officers and crew, unsolicited by the respondent, and without consulting him, executed to him a special *letter of agency*, authorizing him on their behalf to sell the said prize, subject to all incumbrances, for £.24,000, ratifying whatever bargain or agreement the said respondent should make, provided he obtained the said sum of £.24,000 to be divided to the captors without deduction. That in consequence he agreed with *Edward Griswold*, one of the parties in the claim, who was fully empowered by all the other claimants, to sell the same for the aforesaid sum together with every expense which had or might occur, upon condition that he should engage on behalf of said claimants to discontinue and withdraw the appeal; and the respondent and *Edward Griswold*, did, for and on behalf of their respective constituents, conclude the aforesaid *bargain of sale*.

" That when the parties were about to carry the said agreement into effect, *John Poo Beresford*, esq. on whom as senior officer the command of his majesty's ships devolved, claimed as flag officer one eighth part of the said prize, and, upon his asserted interest, objected to the agreement, and applied to this court to prevent the same from being carried into effect, whereby the said agreement was prevented from being completed, and the captors became involved in a legal controversy. But the captors being of opinion that captain *Beresford's* claim would never be admitted in a court of law, and the agreement beneficial to them, expressed their desire to carry the same into effect, and to put an end to the controversy notwithstanding; and for that purpose moved the court for an order for the sale of the ship and cargo; and it was agreed by the respondent and *Griswold* that the respondent should purchase ship and cargo at public auction for the purpose as aforesaid, and that he should hold the property so purchased to the amount of £.24,000, and the captors' expenses, and that the remainder should be held by the claimants.

"That the ship and cargo were accordingly put up to auction, and purchased by the respondent for £.41,671 19*s*. 4*d*. and he believes if he had not bid they would not have produced much above £.36,000.

"That he would not have been concerned if he had apprehended that it would have been required of him to pay into court the proceeds; the particular object being to carry into effect the agreement.

"That after the sale the respondent retained of the cargo to the amount of £.24,000, and the remainder was delivered to *Edward Griswold* upon the express condition that the same should be refunded in the event that the sale made by him could not be carried into effect, and that it should finally be determined that the appeal should be prosecuted.

"That the respondent considers himself responsible to the captors for £.24,000, and bound to pay whenever all the difficulties which prevented the final execution of the agreement should be removed.

"That a part retained, the bark and copper, amounting to £.17,747 19*s*. was sent to *London* and insured. The 16th *December*, 1806, he shipped the bark in the *Yarico*, which was captured. On the 13th *February*, 1807, he shipped the copper in the *Trusty*, which was lost; she sailed 21st *February*. That he is advised that it will be impracticable to recover from the underwriters until he receives a certificate of the customhouse at *Halifax*, dated one year and a day from the sailing of the vessel, that she had not been heard of.

"That the parties proceeded to carry the agreement into effect. The opinion of sir *J. Nicholl* was taken, who declared the aforesaid agreement could be validly carried into effect, after giving due notice to the parties who had not assented.

"That a meeting was held, and that it was agreed that captain *Whitby* should give indemnity against captain *Beresford's* claim and others. That he believes that all difficulty has been removed; that *Griswold* directed *James Stewart*, esq. to withdraw the appeal whenever the agreement could be carried into effect, and which he is ready and willing to do, and the captors

and claimants are satisfied and content the property should rest and remain as it is; and captain *Beresford's* agents are likewise satisfied.

"That the respondent owns property, free from debts, to a larger amount than £.24,000, and has property sufficient to pay £.41,671; but it would be highly detrimental if not ruinous to him to be compelled to pay either of the said sums into court, when he has received but a small part; that he has not derived the smallest advantage from this transaction; and that it would be grievously oppressive upon him to enforce obedience to a monition which no person interested in the said prize, or any part thereof, wishes should be enforced against him."

Upon this answer, as was properly stated by the counsel, two questions arise, 1st, Whether there was any thing illegal in the agreement of sale between the captors and claimants. And 2dly, Whether the court had any right to interfere.

In considering the first question it is necessary to ascertain precisely in what situation the respondent stands before the court; since that situation has been represented by his counsel in a variety of different lights.

If he is to be taken as *a mere purchaser*, as was sometimes stated in the arguments, the whole of the answer is perfectly irrelevant. For from the moment the purchase at auction was complete, the ship and cargo were the absolute property of the purchaser, to dispose of in what manner he pleased; nor is the court in the least concerned in any subsequent transactions: but then the respondent, the same as any other indifferent person, is liable to pay the price, according to the conditions of sale; and no legal defence can be set up against the payment.

But it appears from this answer, and the arguments of his counsel, that the respondent does not place his case upon that footing. He states himself to have been an agent, authorized by captain *Whitby*, and the crew of the *Leander*, to sell to the claimants in this case, the *Herkimer* and her cargo, for the sum of £.24,000 and the charges; that the sale made by Mr. *Hill* was only an amicable sale, merely between the parties to

ascertain the value; that the parties never intended it to be a real sale, but a mere form to enable them to carry the agreement into execution; that the respondent therefore, the nominal purchaser, was not liable to be called upon to pay into court the proceeds of that sale, but was answerable only to the captors, and for the sums which they had deposited with him in consequence of these agreements, namely, the £.24,000 and the surplus for expenses, after *Griswold's* £.9,704 were deducted; and which £.24,000, together with the surplus, were in reality the sum, or price, which *Griswold* had paid the captors for the *Herkimer* and cargo, under the *bargain and sale.*

A great deal of argument has been used to prove the legality of compromises. It does not seem to me to have any thing to do with the present question. Compromises no doubt have been, and may still be made. Parties may recede from their rights, may desert their appeals, and may dispose of their interests, whether present, or only remote, or contingent, upon any terms or conditions they choose; but the real question before the court upon *this* defence is, whether the captors have such a vested interest in the prize itself, or the proceeds of the prize, in the present stage of the cause, that they can take possession of them, and alienate them, without any authority from, and in defiance of, the court of admiralty.

I must own I have my own private opinion upon compromises: that they are making a *job* of war, not very honourable to the nation, and bad policy in the end for the navy themselves; and many high and eminent persons have entertained the same idea. But that is only my own private opinion; and I am certainly not disposed to throw any impediment in the way of a compromise, when conducted in a legal, justifiable, manner, and the parties think it for their interest; as I trust I have ever endeavoured to promote the real good and advantage of the service, as far as was consistent with an impartial performance of my duty. But I cannot but resist an attempt in parties to take the whole law into their own hands, and to wrest prize property out of the legal custody of the court.

If this power of attorney, and the agreement founded upon it, were merely *executory*, and to operate only after final sentence, as was contended by the king's advocate, I do not see how they could at all apply to the present state of the case; they cannot be any authority to the respondent to keep possession of, or to dispose of, capture or proceeds, until the time arrives when they are to become operative. They cannot, as powers from the captors, or as agreements with the claimants, justify an intermediate possession, or disposal of the capture or proceeds; unless he has a right to such possession, or to make such disposal, from some other quarter.

But I think it is pretty evident, that this power, and agreement, are in *verbis de præsenti*, and have been actually *executed*, as was admitted by the king's solicitor. Such was clearly the intention and understanding of the parties. The respondent was in possession of the ship and cargo. He says in his answer, that " he and *Edward Griswold did conclude the bargain and sale.*" It was actually carried into effect, for the respondent, retaining in his own hands a part of the cargo to the amount of £.24,000, and upwards, as an equivalent for the purchase money which *Griswold* was engaged to pay, delivered the vessel, and the remainder of the cargo to Mr. *Griswold.* There was indeed an agreement, that in case the former agreement could not be carried into effect, that *Edward Griswold* should refund the sum of £.9,704, 10*s.* but the sale subject to that sort of contingent defeasance, was nevertheless actually made and completed as a present transaction, by delivery of the goods, and the payment of the price.

The question then, whether this is a legal agreement, or, in other words, whether the parties had a right to sell the ship and cargo to the claimants, in the present stage of the cause, depends upon these points:

1st, Whether captors have a *disposable property* in things captured, or the proceeds of them, before final adjudication. And what is the final adjudication.

2dly, If they have no disposable property, it will be necescary to consider who is entitled to the *custody or possession*, of

captures and proceeds until that period. And how that right of custody or possession is to be exercised.

Upon the first point it must be observed, that even after final sentence, and condemnation, it is far from being clear and certain that the captors would become entitled to the whole or even any part of the capture.

1. It is possible that the crown might claim the *whole* of this prize. By one clause of the prize act, it is enacted that upon proof of the breach of any of his majesty's instructions relating to prizes, or of any offence against the law of nations committed by the captors in relation to any prize, or the persons taken on board the same, the prize shall be condemned to his majesty's use and disposal. *Sec.* 32. *Prize Act.*

By another clause, *sec.* 20. it is enacted, that in case any ship or goods shall be taken and restored by the commander of any vessel of war belonging to his majesty, clandestinely, or by collusion, or connivance, or by consent, (unless the same shall afterwards be allowed and approved by the court of admiralty) such commander shall forfeit the sum of £.1000, and the goods and ship so taken and restored shall be adjudged as good prize to his majesty.

It is not for me to decide, in the present stage of the cause, whether such a forfeiture has been incurred. But is it clear that it has not? It is capable at least of some doubt, and argument: this ship and goods have been certainly taken and restored by the commander, and can it be said otherwise than clandestinely by collusion, connivance, or consent, since it was done by a private agreement, under colour of a sale, and was not allowed or approved by the court of admiralty? In the former part of the clause relating to privateers, the words "without being brought to adjudication" are introduced; but in the latter part, respecting king's ships, no such qualification is to be found; so that the clause applies to a restitution at any time before final sentence. Under the *direct words and apparent meaning* of the act the case does *most certainly come.* It was argued by counsel that it could not be the intention of the act to apply to *compromises.* Be it so, if the compromise, was of

such a kind that it could be legally carried into execution; as a compromise which was not to take effect until after final sentence. But would this equitable interpretation hold good, if the compromise was of such a nature that it could not be legally supported? If the captors had restored the ship and cargo before they had a right so to do?

It is certainly the *spirit* of the act to prevent connivance between parties, and restitutions without the intervention of the court of admiralty. In all other cases of compromise the parties have not proceeded to carry them into execution, until the property was legally delivered by the court, upon a final sentence of condemnation, or restitution by agreement. In *Berens* and *Rucker*, the property was not sold or disposed of; for one reason assigned for the compromise was to enable the parties to obtain a final sentence in order to sell and take advantage of the markets, when restored by final sentence, and not before, notwithstanding the agreement of the two parties, the vessel proceeded to *Amsterdam*.

But here all has been done without any intervention of the court, or final sentence obtained. Under colour of an order for sale, which the parties themselves represent as a merely fictitious, and not a *bona fide* sale merely between the parties to ascertain the value, and never meant to be a real sale, the compromise and restitution have been completed. If this does not amount to a connivance, and real restitution, I do not know what does. Nothing remains for the court to do; the parties have no occasion for any farther proceedings, they do not stand in need of any farther sentence. They have got the property, and as they have made a *private division* of it, so they may proceed to a *private distribution;* and if, according to the argument of counsel, these are the only parties interested, who else has a right to interfere? The court of admiralty and the prize cause may rest in *statu quo* to eternity; these parties have certainly no farther occasion for them, the business is as much completed, without final sentence of the court, and any cognizance in, or intervention of, the court, as if the

whole had been done at sea, the very mischief intended by the act to be guarded against.

The act does indeed speak of restorations which may be allowed and approved afterwards by the court of admiralty, but this must refer to cases of necessity, or under very peculiar circumstances; not to cases, where, without any plea of that kind, the whole law of prize has been subverted.

So far then from its being clear that a forfeiture has not been incurred, I think a very strong case might be made on behalf of the crown. So strong that I cannot but entertain very great doubts whether it is not the duty of his majesty's advocate to enter an appeal on his behalf against the sentence of this court, or even of the court itself to direct such an appeal to be entered, and prosecuted in the court of appeals. Since it is incumbent both on the court itself, and his majesty's officers, whenever any apparent interests of the crown arise, to intervene on behalf of the crown, and bring them forward, to place them in a train for discussion, and if well founded to give them effect.

It is not in that view however that I *now* refer to these clauses in the act; but merely to show that it is extremely possible that, in consequence of these very transactions, the parties may have no interest whatever in this capture, either present or future.

If this claim of the crown is well founded, it is liable to be barred by no time, or limitation whatever. In the case of the *Clarissa*, before the lords, 20th *July*, 1799, the admiralty intervened as in a case of forfeiture to the crown, on account of malfeasance by the captain. An appearance was given by the captor, under protest, upon three several grounds, 1st, that the captor should first have been proceeded against criminally; 2d, that the time of appeal had expired; and 3dly, that distribution had taken place. The protest was overruled by the court on all these points; and it was held that the limitations in the act apply only to the question of prize or no prize, or between captors and claimants, and do not bind the crown as against the captors; and that the crown can be guilty of no *laches*.

2. Other persons besides the actual captors, may be entitled to *share:* vessels may have been in sight, which may hereafter claim as joint captors. It is usual for joint captors not to assert their interest until after final condemnation.

I shall say nothing respecting the claim of commodore *Beresford*, or other persons, to the flag-eighth, since it has been stated, though without any documents, that no opposition will be made from those interests. But the power of attorney itself was not signed by the whole of the officers and crew, who are therefore not bound by it.

Greenwich hospital has two different claims upon the proceeds of prize, by the 46*th Geo.* III. *C.* 101, it is entitled to £.3 6*s.* 8*d.* per centum, on the net proceeds of every prize. This claim is paramount to any prize act or proclamation.

By the marshal's return of the commission of sale, it appears upon the records of this court, that the gross proceeds of this prize were £.41,000, after deducting all necessary charges. May not the hospital be entitled to a per centage upon this sum?

By the prize act, *Greenwich* hospital is entitled not only to all unclaimed shares, but to all unpaid balances of the proceeds of prize, which shall remain, after distribution shall have commenced, six months. It will appear in the records of the court that those proceeds are £.41,000, deducting charges, and that they are in the hands of the agent. If, according to these agreements, the captors shall divide only £.24,000, will not *Greenwich* hospital have a right to demand the residue as an unclaimed balance?

I have now shown that there are actual, contingent, and possible interests in the proceeds of prize, besides those of the captors, even to the extent of totally annihilating the captors' rights; and, consequently, that the captors can make no disposition or alienation of the capture, even as to the future contingent event of condemnation, by which those other actual, contingent or possible interests may be affected; nor can any agreements between the captors and claimants inure to the defeating of those interests, which will still have a lien upon

those proceeds, to the full amount as they appear upon the records of the court, according to their respective extent.

As to the *present interest*, nothing can be more certain than that *before final condemnation* the captors have no legal interest in the capture at all; nothing which they can by any possibility convey to another, either in the name of a compromise, or of any other denomination, and that in case of an appeal, the first sentence is not the final sentence, but the ultimate decision upon the appeal.

This is too clear to admit of a doubt. It is a question which has been most accurately examined, and deliberately settled in some of the most solemn decisions, which have ever taken place in the *British* courts of justice; ships and goods, taken as prize, belong to the crown, as the representative of the nation; no subject has any right to them but by express grant from his majesty. Those grants are subject to any restrictions and limitations, which his majesty thinks proper to make. What is not expressly granted, or comes within any limitations or restrictions in the grant, is an interest still remaining in the crown. The captors' title deeds are the king's proclamation, and the prize act. The proclamation directs that prizes may be lawfully sold or disposed of by captors and their agents, *after the same shall have been to his majesty finally adjudged lawful prize*, and *not otherwise*. By the prize act, the whole interest and property is given to the captors, expressly "*after the same shall have been adjudged lawful prize to his majesty.*" The interest in prize, therefore, before final condemnation, not having been granted to the captors, still remains with his majesty.

These are not mere abstract and theoretical doctrines, and the interest of the crown a fiction of law. It is a real disposable interest, and accordingly in the case of the *Elzebé*, *Maas*, (*5 Rob.*) it was decided, "*that the crown can* release ships and goods that have been taken *jure belli* before adjudication, without the consent of the captors."

These points were the subject of discussion in the case of *Home* v. lord *Camden*. Few cases were ever more frequently and deliberately argued. The action was first brought in the

court of common pleas, from thence it was removed by appeal to the court of king's bench, and finally by writ of error to the house of lords. It was there referred to the twelve judges, who delivered their unanimous and elaborate opinion by lord chief justice *Eyre*. (*H. Blackstone* II. *p.* 533.) After recognizing the general doctrine that the interest and property "do not vest until after the same shall have been finally adjudged lawful prize to his majesty, "lord chief justice *Eyre* proceeds to state, "that the effect of an appeal is to suspend the force of the sentence. From the moment of the appeal being interposed, the sentence is no longer *final;* on the contrary is liable to be reversed in part or in whole." After arguing this point at length, he concludes, "your lordships will see how perfectly inconsistent with the plan of the prize act this notion of the interest and property vesting in the captors, at any time before the final adjudication in the court of appeal, will be found to be. In truth, so far from the interest and property vesting at an earlier period, the legislature, by the words, seems to have cautiously guarded against its being so understood."

But the decision in that case does not rest even here; after settling that the captors had no interest, it proceeds to consider particularly the power of agents over captures and proceeds.

"If it be the true construction of the prize acts, that no interest or property vested in the navy, until after the final adjudication by the commissioners of appeals, it follows that the agent's proceeding to sell soon after the sentence in the admiralty court, must be without colour of authority. In this stage of the proceedings, the agent could only act under the authority of the prize court; and in the manner in which such agents usually do act. Acting *under* the authority of the prize court, they would be to *account* to the prize court; acting *without the authority of the prize court*, they would be in the condition of mere *strangers*, who had *possessed themselves of the proceeds of a prize*, to whom it is admitted, a monition might and *ought* to be issued, to compel them to bring in proceeds." He goes on to state, that "agents, though perhaps they may be *appointed*

before the final adjudication of the prize, have nothing to do until after the final adjudication has taken place, that all the different sections of the prize act, which give powers or impose duties upon agents; all respect *sales in order to distribution*." "The result of these observations is," says lord chief justice *Eyre*, "that that whole case, (and I think *I* may add the whole of the present case) rests upon two fundamental errors; the first, that an interest and property *vested* in the navy as captors, long before it could by any possibility vest; the second, that the navy agents had authority under the prize acts to take upon themselves the *management* and *disposition* of the prize long before such authority could be derived to them."

This case then being decisive that captors have no interest or property in prize, and that agents have no right to sell until after final adjudication, it follows that an agreement entered into by them for the sale of a ship and cargo to the claimants, before that period, is not a legal or valid agreement.

2dly, Had the captors then any right to the possession of the ship and cargo, or of the proceeds; and therefore under cover of a legal possession of the one or of the other, might give effect to the agreement?

This leads us to the next point proposed, namely, who is entitled to the custody or possession of prize until final adjudication? and how it is to be exercised?

This question in general is answered by the same high authority. Lord chief justice *Eyre* says, in the same case, "I take it to be clear, and it was so stated by the civilians in the case of *Smart* and *Wolff*, (3 *T. R.* 323.) that pending a suit in the prize court, the ship and goods are in the custody of the court; the interests of all who are concerned in the capture, are under the protection of the court."

The manner in which the court is bound to execute this trust imposed upon it, depends chiefly upon the respective prize acts: I say chiefly, because it is well known that "these acts form a portion only of the law of prize, and that a great part of the admiralty jurisdiction is founded on the established usage and common law of that court."

In *the high court of admiralty*, captors are left in possession of the capture until final sentence, unless it is taken out of their hands by the court; usually in two cases, that of *delivery* upon bail, and of a *sale* under a perishable monition, upon farther proof, or sentence and appeal. Even *there* upon every sale the proceeds are taken out of the captors' possession and are remitted by the commissioners to the registrar of the court of admiralty, to remain until final adjudication.

In the courts of *vice admiralty* a different mode is pointed out by the acts of parliament. At the very commencement, the prize is taken out of the captors' hands, and the marshal, to whom the officer of the customs is added by the prize act, takes the vessel and cargo into his custody. Being once in the custody of the court, neither the prize itself, nor the proceeds arising from the sale of it, which are the representative of the prize, can be taken out of, or retained from, that custody, but by the authority of the court itself, or the superior court of appeals.

The prize act, in case of appeal, first provides that the execution of the sentence appealed from shall not be suspended in case the party appellate shall give security for the full value of the ship or goods: 2dly, captures may be delivered either to captor or claimant upon giving security for the full value thereof.

In both these cases, the only cases in which *the act directs the delivery of captures to the parties*, security is to be given for the full value.

We come now to the third case provided for by the act, that of a sale. "If there shall be any difficulty or sufficient objection to giving security, the judge shall, at the request of either of the parties, order such goods and effects to be entered, landed and sold by public auction, under the care and *custody* of the proper officers of the customs, and under the direction and inspection of such persons as shall be appointed by the claimants and captors."

How the proceeds of sale are to be disposed of is the next question. There are two acts which direct the court upon this

head, the one enacts what shall, and the other what shall not, be done. The prize act says positively, " that the moneys arising from the sale *shall* be brought into court, and by the registrar *shall* be deposited in the bank of *England*, or, (in case the captors and claimants shall agree thereto) in some public security at interest, in the name of the registrar and of such trustees as the captor and claimant shall appoint." The other act, 41*st Geo.* III. *c.* 96, which is a perpetual act, and expressly confirmed by the prize act, says, " Whereas it is expedient that the proceeds of property captured and converted by sale should be secured until final adjudication; be it enacted, that *in all cases* when a commission of appraisement and sale is granted by the judge of the vice admiralty court before *final sentence*, the proceeds of such sale shall *not remain in the hands of the captors or their agents*, *but shall* be brought into the registry of the court, and remain subject to the farther orders of the court until final sentence."

The cautious, systematic, and well considered regulations of the acts, with the practical interpretation of them by prize courts, for the safe custody of the property is very observable. The capture itself is either in the custody of the law, or it may be delivered to the parties upon sufficient security; if sold, the proceeds must be left in the registry in the actual custody of the court, or placed in the public funds in the name of the registrar, and consequently still in the protection of the court: these are the only alternatives, no power is given to leave the capture in private hands without security given, or the proceeds in any case whatever.

Which of the courses prescribed by the act have been followed in the present case?

The ship and cargo were not delivered to either of the parties upon bail, because sufficient securities could not be found.

Upon the joint motion of both parties the other alternative was adopted: it was sold under a commission from the court.

An argument was advanced by the king's advocate, that " this sale was not made under the authority of the prize act, or in conformity to the regulations prescribed in it, and that

the agent could only have been answerable for the proceeds if the commission of sale had been directed to him."

If the fact were as represented, still the conclusion would not follow, because, as proceeds of prize, which they are admitted to be, however acquired, they are liable to be called in, unless the party can show a legal title to retain them.

But the proceedings in this respect have been perfectly regular, and conformable to the prize act. It was said by the king's advocate, that the sale ought to have been made by the prize agent, under the 53d section of the act, which directs that " all appraisements and sales shall be made by agents appointed by the flag officers, &c." This clause has received a judicial interpretation in the case I have so often referred to, *Home* against lord *Cambden*, where it is expressly held to relate " to appraisements and sales after final adjudication" only.

It was then said that the ship and cargo were not " sold under the direction and inspection of such persons as shall be appointed by the claimants and captors," under the 52d clause. The act does not direct the sale to be made by such nominees, *that* by the usual course and practice of the admiralty is done by commission to the marshal. The parties have a right if they choose to exert it, that the sale shall be conducted under the direction and inspection of such persons as they shall appoint, but if no such persons are appointed they must be taken to have waived their right; and since the sale took place upon a joint motion of the parties that the property should be sold by the marshal, *he* may in some measure be considered as their nominee to direct and inspect the sale.

The sale then was conducted in the usual manner: In virtue of the commission directed to the marshal the ship and goods were advertised as being to be sold under the authority of the court of vice admiralty, they were put up to auction, by Messrs. *Hill, & Co.* and were knocked down to the respondent as the highest bidder.

Upon this review of the prize acts, it appears that as to the *right of possession* the parties could only acquire the possession of *ship and cargo* upon *bail*, or as *purchasers*. They were not

entitled to it upon *bail*, as that mode was found impracticable; if they acquired it as *purchasers* they are answerable for the purchase money, as before stated. And as to the possession of the *proceeds*, they are not entitled to it, either as parties, agents, or purchasers, *in any case whatever*, but are bound to pay them into the registry.

Right, then, the parties having none, how can the court be justified in allowing the respondent to retain the proceeds, contrary to prize acts, for the purpose of effecting an agreement which in itself is substantially illegal, and to support arrangements which the parties had no power whatever to make?

This brings me to the second question, made by counsel.

It is farther pleaded in the answer, " that the captors, and claimants, and the agents of captain *Beresford*, are all satisfied with the security they now have, and are willing to allow the property to remain where it is at present."

Not only no power or authority whatever is given to the court to permit proceeds to be lodged in private hands, but the words of the act are very positive against it; " that the proceeds *shall* be paid into court, and *shall not* remain in the hands of the captors' agent." How then can any consent, or acquiesence amongst the parties, set aside a positive direction to the court.

No such power is given them by the act itself, but the direct contrary may be infered from it. Certain things are allowed to be done " *in case captors and claimants shall agree*," such as that, proceeds may be placed in public security at interest, instead of the bank: in another clause that " property, with the consent of captors and claimants, may be sent to *England* for sale." But if captors and claimants, *by their joint consent*, could dispose of proceeds in a different manner from what the prize acts direct, these clauses, empowering them to make a particular disposition in certain cases, would be totally nugatory. The introduction of these clauses is therefore complete proof, that, in the opinion of the legislature, claimants and captors, by their joint consent, can make no disposition of

captures' proceeds, other than such as the prize acts have directed.

So with respect to delivery upon bail. There is no point upon which it should seem that parties might be more safely trusted to agree than upon the sufficiency of the securities. Yet here the competence of the bail is not left to the mere acquiescence and satisfaction of the parties. A warrant is always directed to the marshal to inquire into and report the sufficiency of the security proposed. How then can it be contended that the consent of parties can justify the court in leaving this property without any security at all?

How little latitude is given by the acts to parties *jointly agreeing* as to the disposition of proceeds. They have only their choice between the bank of *England*, and other *public security*. This joint consent gives no power of making any other disposition; and even then the proceeds are still in the custody of the court; for the property stands in the name of the registrar, as well as of the other trustees. How then can this consent be an authority to the court, to suffer property to remain in the possession of private persons?

For who are these parties who assume a right to authorize the court to permit this property to remain in private hands, and without the security required by the acts? They are parties, who, as has been already proved, have no legal interest or property in the capture whatever. It was because the captors and claimants have not the legal interest that the custody and protection of the property are vested in the court of admiralty. These regulations and restrictions in the prize acts were made as much against captors and claimants, and their agents, as any other persons; to prevent collusions, embezzlements, and other unfair practices, and most particularly to prevent captors from fraud, or loss of property, by their agents. Shall parties then come in and say, *we* are willing to dispense with acts of parliament made against ourselves; *we* desire to divest the court of admiralty of that legal custody and protection, with which the law has intrusted it exclusively, and as against ourselves. And for what purpose is this consent, and acquies-

cence of the parties entered into? To carry into effect an illegal agreement, and to dispose of property to which they have no right or title whatever.

It has been farther urged, that since the parties are quiescent, the court has no *right* to proceed *ex officio*. Admitting that the court was acting merely *ex officio*, in the present case it was competent so to do.

I shall first consider the objections made to this power by the king's advocate, from the prize act. In several sections of this act, security was to be required, or proceeds called in *at the request of parties*. In section 62d, in case of condemnation, where there is *no claimant*, in the vice admiralty court, the judge may compel the agent to give security, at the *requisition of the captor*. In clause 63, in cases likewise where there is *no claim*, the proceeds may be vested at *the prayer of the captor*. In the 64th clause, the judge of the high court of admiralty, at the time of serving the inhibition, or at any time pending the appeal, shall assign the agents or other persons in whose hands the proceeds may have come, to bring them into the registry, *at the prayer of either party*, or of the treasurer of *Greenwich* hospital. The 65th clause gives a similar power to the court of appeals. It was admitted that these provisions mention only cases of no claim, causes in the high court of admiralty, or in the court of appeals, and do not verbally comprehend cases where there *is a claim*, in causes in the courts of *vice admiralty;* but it was argued that the same *spirit* must be extended by *analogy* to *these* cases likewise. The inference is certainly to be drawn the other way. When those other cases and courts are by name mentioned, these clauses cannot be extended to cases and courts not at all mentioned, and which therefore the legislature must be supposed to have intentionally excluded from the operation of those clauses. But in the clauses of the acts under which *these* proceedings took place, and which *do* relate to the case of claims in the vice admiralty court, expressly no such restriction, as "*at the request of parties*," is to be found at all. They say categorically, "the proceeds shall not remain in the hands of captors or their agents,

but shall be brought into the registry of the court." They do not require the court to wait for the application of the parties, but positively direct the thing to be done, and consequently impose it as a duty upon the court.

It was laid down expressly by sir *William Scott*, in *Smart* and *Wolff*, that courts of admiralty have generally the power of proceeding to compel the payment of proceeds, "as well *by the act of the court, ex officio*, as on the application of the parties interested," (3 *T. R.* 329.) He stated it *arguendo*, indeed, but as a settled incontrovertible doctrine, and which was neither disputed by the opposite counsel, nor denied by the court; and as a power which is frequently, and notoriously exercised.

And indeed the courts of admiralty from their very constitution must necessarily be invested with such a power. Those courts are the trustees, guardians and protectors of prize, on behalf of the public. The parties, neither separately nor jointly, have *the legal property* in the subject of litigation. How many cases may be supposed, in which the security of the property might demand the interference of the court, independently of the parties? Imagine fraudulent connivances between parties themselves, or, in their absence, amongst their agents, to the injury of captors and claimants themselves, unforeseen circumstances by which proceeds might be endangered without parties or their agents having it in their power to make application, or not feeling an interest so to do. In these and many other cases which might be conceived a power of proceeding of its own authority is absolutely necessary to enable the court to execute the solemn trust reposed in it, for the security of prize property. This custody, and the want of property in the subject of litigation in the parties, create a great difference between the constitution of courts of admiralty and all other courts. A trust and custody imply the possession of powers to execute them.

The only question then is, whether this power has been properly exerted. Proceedings, *ex officio*, must necessarily be governed by the discretion of the court. I agree with the king's advocate, that this discretion ought not to be a mere

capricious exertion of authority, but a legal discretion, proceeding upon solid grounds. I conceive then,

1st, That the *positive directions of the prize act* are of themselves a sufficient legal foundation for the proceedings of the court.

2d, When the respondent says "that he stands ready and willing to do any thing which any of the parties interested have a legal right to require him to perform," he does not place the business upon a right footing. He is debtor not to the *parties*, but to the *court;* since the property was in the legal custody of the court, and the sale made by its officers. The court must look to the security of the property. I can have no doubt of the respondent's competency; he has sworn that "he has property sufficient to pay the whole sum." But that is not the question. The court must proceed upon general principles. It is not asked whether A B or C are responsible men, but whether the court, without authority and without security, can justifiably leave property to an immense extent in *any* private hands. The opinion of the commissioners of naval inquiry, in their fourth report, to the house of commons, was very decided upon this head; they strongly reprobated it as an abuse that agents should have the use of the proceeds of prize in cases of appeal. It sets, they observe, his interest at variance with his duty. The property is in many instances too great to be trusted to an individual, especially if that individual be engaged in trade; and most of the prize agents abroad are merchants: they are tempted to speculate upon it; and we find that some of the most considerable among them have failed at different periods for very large sums. The principal agency house in *Jamaica*, which is said to have been concerned in nine tenths of the captures carried into that island during the last war, amounting in value to about £.2,143,000 sterling, has been very lately under pecuniary embarrassments," *p.* 262.

Under such an authority can the court be blamed for using some little caution? No power whatever is given to the court to leave proceeds in the hands of purchasers or agents; in case of the failure of those purchasers or agents, as no security is

given, where is the court to look for the property? And what is to shield the court and its officers from the imputation of a neglect of duty? Not the acts of parliament, for they would have been guilty of *laches* in not enforcing them; not an agreement between the parties, which, as respecting the proceeds, are illegal and void. The court must look to possibilities; individuals may exercise a discretion, and may run risks, but a public body, acting as a trustee for the public, must go upon certainties. It would be wanting in its duty to itself if it did not reduce these proceeds into its own possession, and to the crown, in whom the present legal interest vests, and which the court is bound to interfere for the protection of.

3d, The manifestly hazardous situation of the property itself, from other quarters, in addition, would be a still stronger impulse upon the court. A war between *Great Britain* and the *United States* was daily apprehended; this province was threatened with an immediate attack; allowing every merit to the brave defenders of the country, it was not impossible that it might be taken by the enemy. In that case it was evident that nearly the whole of the prize property in the hands of individuals would be in danger of total loss.

In consequence of a requisition from the court, the marshal made a report of the state of prizes. It appeared that upwards of £.120,000 of the proceeds were in the hands of purchasers, whose time of payment had expired. It was retained by them too without any security.

The court thought it right that property to this immense amount should not be left exposed in this dangerous situation, but that, in compliance with the acts of parliament, it should be called in, and invested in the *British* funds. In so doing it thought it was exercising a sound discretion for the security of the property intrusted to it, and that it was performing its duty to the king, to the *British* nation, and to the officers and men of the squadron upon this station.

Upon these grounds the general order of the 23d of *September* was issued, directing all purchasers to pay in their proceeds. Three months elapsed, and but a small part was brought into

the registry. The order of the 29th of *December* was then made, and monitions directed against defaulters, beginning with the case of the *Herkimer*, because the proceeds in that case were of far greater amount than in any other, and because it was understood that resistance would be made to the order for payment. If the order was properly issued it was necessary to enforce it by farther process.

I have hitherto gone on the supposition that the court proceeded *ex officio*, and have shown that it had that power, and was fully justified in exerting it, under the present circumstances. But I am more inclined to think that these proceedings were not *ex officio*. They were founded upon the application of the parties. The minutes of the court appear thus in the register: "on motion of counsel for captors and claimants, stating that difficulties had occurred in procuring securities, and praying the court to direct *a sale of the property, and the proceeds paid into the registry, and to take the usual course;* the judge decreed a commission of sale." The express application of both the parties, concurred, therefore, with the regulations of the prize act, in imposing an obligation upon the court to compel the payment of the proceeds. The monition was merely in execution of the commission of sale, and in aid of the marshal, who was answerable for the proceeds of sale.

The court might indeed have proceeded against the marshal, and have committed him upon an attachment for not returning the commission with the proceeds, as in the case of the *Fortuna, Gerritts;* or the marshal might have prayed a monition against the party. But as the marshal stated to the court that he had applied in vain for payment, the court judged it expedient, and the most expeditious mode of proceeding, to issue a monition directly against the party who was in possession of the proceeds.

Little stress was laid upon one argument just stated by the counsel, that the whole cause was now out of this court on account of the appeal. On this no farther observation need be made, than that these proceedings are what are directed by the

act to take place after the appeal entered, and in consequence of the appeal.

In considering the protest and the answer, and in following the arguments of counsel in their full extent, and in every point of view, which for the satisfaction of the parties and the justification of the court, I thought it incumbent upon me to do, I have been obliged to take a wide range. To bring the whole to a single point. It is evident then that the respondent's plea, that though in *strictness of law* he may be a purchaser, under the marshal's sale, and responsible for the purchase money, yet *in justice and equity* he ought not to be called upon to pay it, because *the truth of the transaction was* that it was a present sale of the ship and cargo by the captors to the claimants, is not maintainable, because the captors had no legal interest or property in the ship or cargo to dispose of. 2dly, That, though after the sale by the marshal, the purchasers had a right to dispose of the ship and cargo in what manner they thought proper, the court is only concerned with the contract of sale, and has nothing to do with the subsequent transactions; which can therefore afford no plea for the retention of proceeds. 3dly, That the respondent has no right whatever to hold the proceeds as agent for the parties, because the prize acts give no such power, but expressly direct them to be paid into the registry. 4thly, That the respondent, therefore, stands before the court only as a purchaser, as a mere stranger in possession of the proceeds of prize, and consequently liable to the farther compulsory process of the court in case of nonpayment. I conceive too that as any other purchaser, by the law and practice of merchants, he is chargable with interest from the time of payment, which, by the conditions of sale, was fixed at six months.

However great may be the interests at stake, the present transaction in itself is a mere trifle in comparison to the real question before the court, which is not merely whether the proceeds of the *Herkimer* shall be brought into the registry, but whether the parties, or the court of admiralty, have the custody and disposal of captures before final adjudication;

whether the powers and authorities of the court shall be superseded, and the regulations of the legislature evaded and defeated, by a combination of parties. The substance of the answer, with the statements of counsel, do indeed afford a most extraordinary kind of defence. When the purchaser is called upon to pay the purchase money, we are told, that by some private understandings, unknown to and unauthorized by the court, a solemn public sale made under its authority by its own officers, and under the express directions of an act of parliament, is a mere fictitious sale, the purchasers ideal, and the purchase money returned in the marshal's account of sales a nonentity, which nobody is accountable for; and that under colour of that fictitious sale, without any authority from the court, the parties have taken possession of ship, cargo and proceeds; the law indeed says that captures shall not be delivered to parties but upon bail, upon the stipulation of two securities, who must justify in double the value, besides the responsibility of the party; and that proceeds shall not be retained in any case. By this contrivance of a sale they have evaded the prize act, and have got possession of the capture without giving any security whatever, and still claim to hold the proceeds; and it cannot but occur to the recollection of the court that the person who has thus acquired the possession without security, in open court declared himself unable to justify as *one* of the securities. Having thus, I may say, as against the court, and if their plea could be valid, *fraudulently* obtained possession, the parties have divided the ship and cargo amongst themselves, without a shadow of right or power. Such a case loudly calls upon the court to vindicate its own authority, and that of the laws.

It has been alleged, by way of a mitigatory plea, by the respondent, "that he would not have been concerned in the purchase if he had apprehended that it would have been required of him to pay into court the whole proceeds of the sale of the said ship and cargo, the particular object of the said purchase on the part of the respondent being to enable him to carry into effect the said agreement." If indeed the parties in this case had erred through ignorance, or from inadvertence,

they might justly be entitled to some indulgence; but they were perfectly cognizant of the nature of the transaction in which they were engaged. The law upon the subject has been frequently stated by this court. It has had occasion to animadvert upon former irregularities, which had taken place with respect to agreements and divisions of proceeds. In this case in particular, soon after the condemnation, when it was proposed to take the property upon bail, and when commodore *Beresford* gave in his protest against a compromise, the court at length stated the law relating to the rights and powers of parties, and their agents, over captures and proceeds. It stated them precisely in the same manner as it has done this day, and it supported its opinion by the quotation of the same great leading decisions which it has now again referred to. If, with this information and after such caution given, parties will take upon themselves to be wiser than the law, to contravene the provisions of the legislature, and to act in defiance of the court, to themselves only they must attribute the consequences.

But the respondent, though thus without lawful excuse, has thrown himself upon the compassion and mercy of the court. He alleges that though "he has property sufficient for that purpose, engaged as he is in commercial concerns, it would be highly detrimental, if not ruinous to him, to be compelled to pay the said sums into court." I hope, in attending to that plea, I do not suffer my feelings as a man to encroach too much upon my public duty; but I am unwilling to exert even the just authority of the court, to the detriment of any individual. However unjustifiably they may have acted, the court is disposed to enable the parties, as far as it is consistent with its duty, to disentangle themselves, if possible, from the difficulties in which they are involved. I have no doubt but the respondent is responsible, both now and after the final decision, to the full amount of the proceeds of this ship and cargo: the only relief which it is in the power of the court to allow is that of delay as to the time of payment.

The respondent prayed the court to receive another affidavit in explanation of the transaction before it decreed any further process, the material part of it was as follows:

"The only means which now remained to be adopted were to let the ship and cargo be sold under the authority of the court; but adhering to the purpose of compromise, the basis of which was that *Griswold* and myself should be accountable to the claimants for the sum of £.43,875 (from which would be deducted £.23,600 their part of the sum compromised) it became necessary that we should not suffer the property to be sold for a less sum; it was agreed that I should become the ostensible bidder, and as neither ship nor cargo brought the sum we agreed upon to be the true value, they were of course knocked down to me. After the sale it was agreed that as the ship could not sail from *Halifax* in any other capacity than a *British* vessel, that I should take her wholly to myself for £.2,500, which I accordingly did, and she was registered in my name by that of the *George*. The cargo was to be equally divided between Mr. *Griswold* and myself. As the bark and copper were better adapted for the *English* than the *American* markets, we determined that those articles, which composed part of the *Herkimer's* cargo, should be sent to *London* on our joint account. The cocoa, being the other part of the cargo most suitable for the market of the *United States*, it was decided should be laden on the *George* for *New York*. Upwards of three hundred tons were accordingly shipped on that vessel. Previous, however, to her sailing, I agreed to buy from Mr. *Griswold* half the copper, (being his interest in it) at 16*d.* per lb. amounting to £.4,668, and seventy five tons of his half the cocoa, at £.71 per ton, amounting to £.5,325. Thus I held an interest in the *George's* cargo, to *New York*, of two hundred and twenty tons of cocoa. I also agreed with him for a certain commission of four and a half per cent. to consign my said part of that vessel's cargo to him for sale at *New York*, he guaranteeing to me the sales and remittances. In consequence of his allowing me to ship to *London* his half the bark, to be consigned to my correspondent, and the proceeds to be under my

control, I allowed him to retain 17,400 dollars (the prime cost thereof) out of the proceeds of the *George's* cargo. The balance of the proceeds of that consignment, and the amount of sales of the ship, *Griswold* was to remit to my agent in *London*, on or before the 1st of *August*, 1807, in the event that the compromise could not, by the opinion of sir *John Nicholl*, be legally completed in the court of appeals. For the more clear elucidation of these transactions, and the state of Mr. *Griswold's* account with me, I refer to the annexed paper, by which it will evidently appear that he has under his control the proceeds of the ship and cargo, to the amount of about £.27,000."

From this affidavit, though the respondent had stated in his first affidavit that it would be "grievously oppressive upon him to be compelled to pay the said proceeds, when he had received but a very small part of the said property," it now appeared that more than three fourths of the property belonged to him, and had been sent on his own account for sale to the most advantageous markets, above a year since.

That though the respondent had stated, "that he had not derived the smallest profit or advantage from this transaction," yet that it was in reality a speculation from which the agents expected to have received much emolument; that the bark and copper sent to *England* and lost, were covered by an insurance; that by the statement in the account current, of the probable proceeds of the ship and cargo at *New York*, compared with the prices paid by the respondent to Mr. *Hill* and Mr. *Griswold*, the respondent expected to realize above £.3000 upon those sales only; that those sales having been effected, and Mr. *Griswold* charged with those probable proceeds, there was reason to believe that that part of the speculation had succeeded.

That though the respondent stated, that one principal reason for listening to the claimants' proposals was, "the great loss of interest which would arise to the captors on the proceeds of the ship and cargo during the controversy of an appeal," yet that by the mode adopted no interest whatever

would be made upon the proceeds for the benefit of the captors, as would have been the case had the method prescribed by the act of parliament been pursued, by placing the money upon public security where the accumulating interest would have paid the expenses of the cause.

And, upon the whole, that though these statements were immaterial to the points in question, yet that the facts appearing upon them rendered the principles laid down by the court still more applicable to the case.

The court however in fixing the time for payment consulted the wishes of the party himself, and, accordingly,

Decreed a peremptory monition to the respondent, to pay £.41,671, 19*s*. 4*d*. with interest, from six months after the sale, on or before the 10th day of *May* next.

THE ADVERSARIA.

No. II.

PRINCIPLES IN THE LAW OF NATIONS.] All the members of a state are answerable for the injustice of the government to which they belong, whose acts, in all legal and political consideration, are their acts.

IT has been reserved to the mischievous policy of the *French* republic to separate the governed from their governors, and to attempt a distinction in their consideration and treatment of them. But surely it is the most elementary of all principles, that every individual is bound by the acts of his government to foreign states: every subject of a state at war is, by the universal policy of all law, an alien enemy to every subject of the hostile state, and in all legal consideration is so treated. It is very true, that nations at war do, for their own convenience in keeeping in their own hands the direction of the public force, usually discourage their subjects, not specifically authorized by themselves, from engaging in acts of hostility; it is likewise true, that motives of private humanity and courtesy do, in a variety of cases, prevent the exercise of the

most indubitable hostile rights. But every man whose mind is tinctured with the first principles either of general law, or of the institutes of particular countries, knows extremely well that these are mere relaxations and exceptions arising out of other causes which do not constitute the law, but prove the contrary tenor of the law by the very circumstance of their being relaxations and exceptions. I venture to assume, as a principle, placed beyond the reach of all contradiction, that war is waged not between government and government, but between nation and nation, and the individuals of each; and that to prove this by authorities, would merely be to transcribe every book that has been composed upon the subject.

The property of individuals is legally answerable for the imputed injustice of their government.*

If the individuals of a state are in any degree the objects of war, in what other way can they be so, than in their persons and in their property? For what is war else but the infliction of evil upon the persons and properties of men for the purpose of compelling them to the observance of justice? Those sentimental writers who are perpetually preaching up the doctrine of humanizing war, seem to regard it in no other light than as a mere physical calamity, or a storm, sent by Providence; or a visitation of evil, which human care and attention is by every possible method to enervate and disarm. They forget that war is the exercise of a legal and moral right, certainly not to be lightly undertaken upon slight or dubious grounds of quarrel, but as certainly to be undertaken upon grave necessity, as the appointed means for deciding the disputes of independent communities of men; and when undertaken, not less certainly to be conducted in a manner effectual for its purposes. Till

* Professor *Schlegel* in his work upon the visitation of neutral vessels under convoy, maintains that the right of taking possession of the property of an enemy must be limited to property, which, being public or belonging to the state, is alone to be considered as hostile. *p.* 52. *Fr.*

men can find out the happy secret of carrying on a peaceable war, it must be carried on by modes of inconvenience and injury, if it can be so described, to the interests of individuals; and the force that is so employed is employed in the most legitimate direction. I should be glad to learn from this school of pretended philanthropists, what war is, when it is not permitted to carry such consequences with it. Accordingly, the great business of the maritime tribunals of the law of nations has been to decide whether the property which has been seized under an exercise of this right, does, in reality, belong to a subject of the enemy or not; and if it does, in what country is the tribunal to be found which does not immediately proceed to a sentence of confiscation, unless it is protected by the privilege of some treaty, or of some special circumstance that is legally admitted to found an exception? And if this legal practice of all civilized states, enforced by their tribunals, and recorded by all their eminent writers, does not constitute any fundamental part of the law of nations upon this subject, I should have been glad to have learned from Mr. *Schlegel* what he considers as its proper foundations.

The rights of war externally against the public enemy, in which are included all his individuals, are naturally and originally unlimited.

Primarily, and by the natural law of nations, which is nothing but the law of nature and universal justice transferred from individuals to communities, all modes of hostile violence are legally practicable; and the use of one instrument of destruction is just as legitimate as another. The practice of mankind, influenced by different considerations of humanity and convenience, has agreed in confining the ordinary operations of war within certain modified bounds; and so far as universal practice has imposed a limitation, so far that limitation is to be respected in the common exercise of hostility; though perhaps extreme cases may be put in which the original rights of self defence might warrant a recurrence to a degree of hostile ac-

tivity beyond it. Supposing, therefore, that Mr. *Schlegel* was well founded in his assertion of the fact, that the practice of land-war had abstained from the capture of private property, what effect would that have upon maritime capture, which at the same time is admitted to have been uninterrupted? the only rational conclusion would be, that the one is a legitimate exercise of war, and that the other is not: both of them natural modes of making war, but the one being for some reason or other, proscribed by the practice of mankind, whilst the other is left in full force and vigour by their common consent? Upon a subject like this, of a limitation of a right naturally indefinite, there can be no other criterion of what is legal than the common consent of the civilized part of mankind expressed by their universal conduct: a conduct not lawless and irregular, but a conduct sanctioned by their legal institutions, and regulated by their common tribunals. This is the real conventional law of mankind, about which Mr. *Schlegel* has surely lost himself in the wildest of all possible misapprehensions, when he supposes it to arise out of particular treaties. Such treaties are certainly the conventional law of the particular states between whom they subsist, but the conventional law of nations stands upon other foundations, and is to be found in the legal practice of all states not specially tied up by treaties upon that particular subject. The *practice* of civilized states is, in all cases where it is not inconsistent with natural duties, the *law* of civilized states. It is therefore not without surprise that one sees, in a book professed to be written by a person of judicial experience and learning, the authority of the venerable *Grotius*, who, in his immortal work, has described the practice of states as one of the great foundations of the law of nations, surrendered up at once and without reserve to the censures of that licentious speculatist *Rousseau*, a man born for the mischievous purpose of shaking the established opinions and practice of mankind, and whose freedom, or shall I call it audacity of thinking on many subjects, was the fruit, natural enough, of his entire ignorance respecting them.

But, how true is the assertion that private property is actu-

ally protected from land capture in war? What is the pillage of towns? What is booty? Does any man deny that these are lawful exercises of the rights of war? What is the practice of exacting contributions but a moderated and stipulated exercise of the same right; and which presupposes its existence? On what other foundation can these be defended? Or how can a contribution at land be demanded on any other principle than a ransom or composition at sea? an acceptance, in all cases, of a part where the whole was legally liable?

The fact is, that a land war is generally conducted for the acquisition of territory; the object of a sea war is the commerce of the enemy. The one naturally shows great indulgence to property; much of which an armed force cannot possibly remove; and which may be supposed to belong to persons, who from the conquest of that territory may be the future subjects of the state; whilst the very purpose of the other is to enrich the state at the expense of the enemy, depriving him of his resources of commerce, to put itself and its subjects in possession of them.

Character of an Honest Lawyer.

Justitiæ cultor, rigidi servator Honesti, in commune bonus.

Licensed August 22, 1676, *Roger L'Estrange.*

AN honest lawyer is the lifeguard of our fortunes, the best collateral security for an estate: a trusty pilot, to steer one through the dangerous (and oftentimes inevitable) ocean of contention: a true priest of justice, that neither sacrifices to fraud nor covetousness; and in this outdoes those of a higher function; that he can make people honest that are sermon proof. He is an infallible anatomist of *Meum* and *Tuum*, that will presently search a cause to the quick, and find out the peccant humour, the little lurking cheat, though masked in never so fair pretences: one that practises law, so as not to forget the gospel, but always wears a conscience as well as a gown; he weighs the cause more than gold; and if that will not bear the touch, in a generous scorn puts back the fee.

Though he knows all the criticisms of his faculty, and the nice snapperadoes of practice, yet he never uses them, unless in a defensive way, to countermine the plots of knavery; for he affects not the devilish skill of outbaffling right, nor aims at the shameful glory of making a bad cause good; but with equal contempt hates the wolf's study, and the dog's eloquence; and disdains to grow great by crimes, or build himself a fortune on the spoil of the oppressed, or the ruin of the widow and orphan. He has more reverence for his profession, than to debauch it to unrighteous purposes; and had rather be dumb, than suffer his tongue to pimp for injustice, or club his parts, to bolster up a cheat with the legerdemain of lawcraft.

He is not faced like *Janus*, to take a retaining fee from the plaintiff, and afterwards a backhanded bribe from the defendant; nor so doubletongued, that one may purchase his pleading, and the other at the same, or a larger price, his silence; but when he undertakes a business, he espouses it in earnest; and does not follow a cause, but manages it. A mollifying letter from the adversary's potent friend, a noble treat, or the remora of a lusty present from the great, has no influence to make him slacken his proceedings: for he is so zealous for his client's interest, that you may sooner divorce the sun from the ecliptic, than warp him from his integrity; yet still is his patron only *usque ad aras* (as far as just); for if once he finds the business smells rank, *St. Mark's* treasure, or the mines of *Potosi*, are too small a fee to engage him one step further.

As his profession is honourable, so his education has been liberal and ingenious; far different from that of some jilting pettifoggers, and pursemilking lawdrivers, whose breeding, like a cuckoo's, is in the nest of another trade, where they learn wrangling and knavery in their own causes, to spoil those of other men, and, with sweetened ingredients of mechanic fraud, compound themselves (though simple enough) fit instruments for villany. But his greener years were seasoned with literature, and can give better proofs of his university learning, than his reckoning up the colleges, and boasting his name in the buttery book: he understands logic (the method

of right reasoning) and rhetoric (the art of persuasion), is well seen in history (the free school of prudence), and no stranger to the ethics and politics of the ancients. He is skilled in other languages besides *Declaration Latin* and *Norman* gibberish: he read *Plato* and *Tully* before he saw either *Littleton* or the *Statute Book*, and grounded in the principles of nature and customs of nations, came (*lotis manibus*) to the study of our common municipal law, which he found to be *multorum annorum opus*, a task that requires all the nerves of industry; and therefore employed his time at the inns of court, better than in hunting after new fashions, starting fresh mistresses, haunting the playhouses, or acquiring the other little town accomplishments, which render their admirers fine men in the opinion of fools, but egregious fops in the judgment of the wise.

In his study, he traffics not only with the infantry of epitomes, abridgments, and diminutive collectors in *decimo sexto*, but draws his knowledge from the original springs, digesting the whole body of the law in a laborious and regular method, but especially aims to be well versed in the practice of every court, and rightly to understand the art of good pleading, as knowing them to be the most useful to unravel the knotty intrigues of the cause, and reduce it to an issue; yet hates to pester the court with *circuities*, *negative pregnants*, *departures* and multiplied *inconveniencies*.

He never goes about with feigned allegations to cast a mist before the eyes of justice, that she may mistake her road, and assign the child to the wrong mother: endeavours not to pack a jury by his interest to the under sheriff; nor to balk an evidence with a multitude of sudden insnaring interrogatories; nor maintains any correspondence with the knights of *Alsatia*, or ram-alley vouchers. He can prosecute a suit in equity, without seeking to create a *whirlpool*, where one order shall beget another, and the poor client be swung round (like a cat before execution) from decree to rehearsing, from report to exception, and *vice versa*, till his fortunes are shipwrecked, and himself drowned, for want of white and yellow earth to wade through on. He never studies delays to the ruin of a

family, for the lucre of ten groats; nor, by drilling quirks, spins out a suit more lasting than buff, depending a whole revolution of Saturn, and entailed on the third and fourth generation. He does not play the emperic with his client, and put him on the rack to make him bleed more freely, casting him into a swoon, with frights of a judgment, and then reviving him again with a cordial writ of error, or the dear elixir of an injunction, to keep the brangle alive as long as there are any vital spirits in the pouch. He can suffer his neighbours to live quiet about him, without perpetual alarms of actions and indictments, or conjuring up dormant titles to every commodious seat, and making land fall five years' purchase, merely for lying within ten miles of him.

He delights to be an arbitrator, not an incendiary, and has *beatus pacificus* oftener in his mouth than *currat lex*. He never wheedles any into endless suits for trifles, nor animates them to undo themselves and others for damage feasant, or insignificant trespasses *pedibus ambulando;* but (as *Telephus'* sword was the best cure for the wounds it made) advises people to compose their assaults and slanders over the same ale that begot them; nor does he, in weighter cases, extort unreasonable fees; for whatever the foulchapped rabble may suggest, a lawyer's profession is not mercenary; the money given him is only an honorary gratuity for his advice and trouble, or a grateful acknowledgment of our obligations for his well intended endeavours; and the old emblem of the brambles tearing off the sheep's fleece that ran to it for shelter in a storm, can have no reflection upon him, whose brain is as active, and his tongue as volatile, for a pennyless pauper, as when oiled with the *aurum potabile* of a dozen guineas.

In a word, whilst he lives, he is the delight of the court, the ornament of the bar, the glory of his profession, the patron of innocency, the upholder of right, the scourge of oppression, the terror of deceit, and the oracle of his country; and when death calls him to the bar of heaven, by a *habeas corpus cum causis*, he finds his judge his advocate, nonsuits the devil, obtains a liberate from all his infirmities, and continues still one of the long robe in glory.

REVIEW.

Reports of Cases argued and ruled at Nisi Prius, in the Courts of King's Bench and Common Pleas, from Easter Term, 33 George III, 1793, to Hilary Term, 39 George III, 1799. By *Isaac 'Espinasse*, of Gray's Inn, Esq. Barrister at Law.—A new edition, with Improvements. By *Thomas Day*, Counsellor at Law, vol. 1 and 2, 3 and 4, in 2 vols.—Hartford. Printed by Hudson and Goodwin. 1808.

WHATEVER is the comparative value of these Nisi Prius Reports in the courts of *Westminster Hall*, they have certainly been useful in this country, which is proved by the explanations they afford of the practice on innumerable points, which frequently cannot be found in the solemn adjudications of the whole court. Disputes on practice, and on principles of evidence may be severely contested here, which, having been long settled, are allowed no more to be controverted in *Great Britain*. If such is the importance of these reports, their value is doubled by the labours of Mr. *Day*. In the hurry of jury trials, little opportunity is afforded to the counsellor for research among the authorities; and to the collected wisdom of hundreds of years, as displayed in the annals of the law, or explained by the treatises of grave and learned men, the reporter has less leisure to make references, when the usefulness of his volume depends so much upon its early publication. With all his diligence, Mr. *'Espinasse* has not usually referred to more than one book in the course of ten or a dozen pages; but the citations in Mr. *Day's* edition amount to many thousands, and he has more on a single page in some cases, than are to be found in the whole four volumes of the *English* reporter. We shall extract part of Mr. *Day's* advertisement, to show the public what were his objects in this work, and we assure them they are completely attained.

The improvements attempted in this edition, consist of *references*, *notes* and *corrections*. The references are to other reports of the same case; to other cases supporting or oppugning the same point;

to analogous cases; and to the opinions of eminent jurists. The notes are abstracts of analogous cases, and observations upon them. The corrections are limited to such errors in the text, as were evidently either clerical or typographical.

The notice taken of *American* cases, the editor trusts, will add something to the value of the work. In the states in which they were decided, they will, of course, be regarded as authorities. In the other states, their use to illustrate principles, and to guide in the application of them; to extend the range of juridical inquiry; to concentrate the wisdom of many, sanctioned by the test of experience; to guard against sudden impressions, and local prejudices; and, especially, to lead to a uniformity of decisions in different jurisdictions, which, though separate, are yet so connected, that uniformity is essential to reciprocity and justice, will be perceived, and acknowledged by every liberal lawyer.

Besides the references to *English* authorities on the same topics, or to analogous cases, the law books of our side of the water are found in the margin. This will open new sources of information to many of our bar, who, however conversant with the ancient and modern adjudications in *England*, are not unfrequently so ignorant of the decisions in any other state, than their own, as never to have heard the names of some of the reporters. Mr. *Day's* American authorities, though perhaps all of them do not deserve that name, are, 1 and 2 *Washington's* Reports, *Addison's* do. 1 *Hayward's* do. *Taylor's* do. 1, 2 and 3 *Cranch's* do. *Bay's* do. 1, 2, 3 and 4 *Dallas's* do. *Wallace's* do. 1, 2 and 3 *Caines's* New York Term Reports, 1 and 2 *Johnson's* Term Reports, 1 and 2 *Caines's* Cases. *Pennington's* Reports. 1 *Hening* and *Munford's* do. 1 *Peters'* Admiralty Decisions. *Kirby's* Reports. 1 and 2 *Root's* do. 1 *Day's* Cases. 1 and 2 Massachusetts Term Reports. *Caines's* Lex Merc. Am. *Chipman.* 2 *Swift's* System.

It is not to be expected, that the case, cited by a lawyer, will always have a favourable influence on the principle, he would support. In a note to *Arden* v. *Sharpe et al.* 2 *Esp.* 525, Mr. *Day* says, it is not necessary, "that the act" of one, "in order to to be binding upon the partnership, should be done with the

assent or knowledge of the others: Nor that it should be done on the partnership account. The act of one partner, in the usual course of business, in the name of the partnership, though on his *private account*, will bind the partnership." For this latter point we are referred *Drake & al.* v. *Elwyn & al.* 1 *Caines* 184. But the difficulty in that case was chiefly the proof of partnership. To the point, after that, whether the note, signed by the style of the firm was given on a partnership transaction, judge *Kent* says: " The intendment is, that it was on a partnership account, and that intendment ought to have been repelled by the defendants, if not founded in truth." This appears to us a little at variance with the principle it was cited to establish, which is, however, good law.

Another part of this same note is worth extracting, to show the strange custom of our sister state of *Connecticut*.

The principle, which makes the act of one partner, in the course of trade, the act of the partnership, does not apply to *deeds*. One partner cannot bind the partnership by deed, though executed in the partnership name. *Harrison* v. *Jackson, et al.* 7 *Term Rep.* 207. *Gerrard* v. *Basse, et al.* 1 *Dal.* 119. And, *a fortiori*, a covenant, or a promissory note, where such notes are specialties,* executed by one partner, in his *individual* name, though on the partnership account, will not be binding on the partnership. *Mead* v. *Tomlinson*, 1 *Day's Ca.* 148. *Ripley* v. *Kingsbury*, 1 *Day's Ca.* 150, note (*a.*) Neither can partners compel each other to *appear in suits*, nor *represent each other in courts of law. Per Chase, J. Hills, et al.* v. *Ross*, 3 *Dal.* 331.

* *In* Connecticut, *promissory notes are regarded as specialties.*

That lord *Kenyon's* opinion, in *Rex* v. *Eden*, 1 *Esp.* 98, was erroneous, is fully proved in Mr. *Day's* notes. The defendant was indicted for perjury, in his testimony on a former trial; and *Brett*, against whom a verdict was given, in consequence of *Eden's* testimony, being called as a witness for the prosecution, was objected to, as incompetent, unless he had paid the debt and costs in that action. His lordship admitted the force of the objection, and rejected the witness, because, " it appeared to him, that, in case the defendant was convicted on this pro-

secution, that *Brett* would be relieved in a court of equity against the judgment, the verdict having been obtained on the sole evidence of *Eden*. That therefore the conviction of *Eden*, being the means of relieving him from the judgment, was an interest which rendered him incompetent."

Part of another note on this case we extract, as a specimen of the diligence of the *American* editor:

The person, in whose name an instrument has been *forged*, has been uniformly held to be an incompetent witness to prove the forgery; and this is considered by lord *Ellenborough*, [4 *East*, 582] as an anomaly in the law of evidence. "Upon what principle," he adds, "the anomalous case was so settled, I cannot pretend to say; but, having been so settled, it may be too much for judges sitting upon trials, to break in upon it. The anomaly can only be remedied now, by the legislature." Vide *Watts' case*, *Hardr.* 331. *S. C.* 3 *Salk.* 172. *Rex* v. *Russell*, *Leach's Cro. case*, 10. *Robert Rhodes' case*, *Leach's Cro. case*, 25, 26. *Rex* v. *Taylor*, *Leach's Cro. case*, 215. *Caffy's case*, 2 *East's P. C.* 995. *Rex* v. *Rhodes*, 2 *Stra.* 728. *Peake's Ev.* 168, 9. In *Connecticut*, this anomaly has been adopted from the *English* law. *State* v. *Bronson*, 1 *Root*, 307. *State* v. *Blodget*, 1 *Root*, 534. But not in *Pennsylvania*. *Respublica* v. *Keating*, 1 *Dal.* 110. *Pennsylvania* v. *Tarrel*, *Addis.* 246. *Respublica* v. *Ross*, 2 *Dal.* 239; nor in *Massachusetts*. *Commonwealth* v. *Hutchinson*, 1 *Mass.* Term. Rep. 7. Mr. *East*, in his *Treatise of the Pleas of the Crown*, *vol.* ii. *p.* 994. attempts to show, *that the distinction is not an arbitrary one*. His reasons in support of it are certainly plausible. One of them, Mr. *Evans*, in the appendix to his translation of *Pothier*, *p.* 316, says, he has heard assigned by a learned judge.

The cases, in which the action for money had and received will lie, and where not, are well marshalled by Mr. *Day* in a note to *Marriott* v. *Hampton*. 2. *Esp.* 548. An important note will be found on *Chaters* v. *Bell & al.* 4 *Esp.* 49.

The *American* authorities are usually cited after the *English* upon the same point; and we wish the editor had uniformly adhered to that rule. The names, that most frequently appear in the notes, are *Dallas*, *Caines*, *Johnson*, *Bay*, and *Cranch*. *Root's* Reports are perhaps quoted oftener, than their value

will justify. Our Massachusetts Reports occur but twice or three times. Mr. *Day's* Reports of Cases in Error, which the character of the editor must stamp with high value, are referred to with a parent's fondness; but we hope the gentleman will favour the public with another volume of them and will also continue the publication of these Reports at Nisi Prius on the same principles, which he has followed in the work before us. Such unusual diligence must be successful; and to every *American* lawyer, desirous of possessing the reports of *Espinasse*, we earnestly recommend this edition of Mr. *Day*.

The mechanical part of the book deserves praise: the paper is better than our *American* press often employs; the proof sheets have been revised with considerable care; so that the book is decently correct, more so than the *London* copy, which is certainly not to be said of one book in three from our printers; the binding is the best we have seen. The price, though the work is one of the few *American* editions worth much more than the *English*, is three dollars less than the copies imported. This may appear a proper place for censure on some of our *Philadelphia* and *New York* publishers, who charge enormous prices on their editions of *English* books. We may specify *Bosanquet* and *Puller's* Reports, as uncommonly dear, and of very villanous execution.*

[* The *Philadelphia* edition of *Robinson's Reports* deserves the severest censure on these accounts. I am inclined to believe that *Bos.* & *Pul.* except the title page, was printed in *Dublin.*]